IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-130

MOTORISTS MUTUAL INSURANCE COMPANY,
Petitioner,

v.

TERESA SIMPSON, Administratrix of the Estate of Raymond K. Simpson, deceased, and RANIO SIMPSON, GARY SIMPSON, and Jo ANN SIMPSON, by their next friend, Frances Benoit,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this action on March 27, 1974, affirming a judgment of the United States District Court for the Southern District of Indiana.

OPINIONS BELOW

No opinion was filed by the District Court in entering judgment. The opinion of the Court of Appeals, as amended on rehearing, is reported at 494 F.2d 850, and that opinion, as originally filed by the court, is attached as Appendix A. The judgment of the Court of Appeals is attached as Appendix B, and the unreported order of

the Court denying rehearing is attached as Appendix C. The Memorandum of Opinion and Judgment of the District Court for the Northern District of Indiana in a previous action between Petitioner and the principal Respondent involving the same facts is attached as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on March 27, 1974. A timely petition for rehearing was filed on April 9, 1974, and was denied on May 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Do the minimum standards governing the accepted and usual course of judicial proceedings of federal appellate courts permit a court of appeals to affirm a judgment in the following circumstances:

1. The court affirmed the denial of a requested instruction that it admitted to be the instruction required by the applicable law of Ohio, on the basis that the instruction given over Petitioner's objection "incorporated the principal elements of bad faith as viewed by the Ohio courts." The instruction given failed to state any of the specific elements required by the Supreme Court of Ohio and could not rationally be determined to be consistent with the instruction required under Ohio law.

2. The court affirmed the exclusion of Petitioner's principal evidence directed to the issue of a claim of bad faith on the ground that, while it had "probative value" on that issue, the evidence had not been offered on that issue. Confronted on rehearing with the record showing that Petitioner had specifically offered the evidence on the issue of bad faith, the court simply edited its original opinion to delete the sentence explaining its ruling, leaving a

sentence stating that Petitioner had been permitted to offer other evidence. The other evidence in fact had been offered by *Respondents* over Petitioner's objection, in a ruling that was one of Petitioner's grounds for appeal.

3. The court found that the record "resounding[ly] supports" a finding of bad faith on the basis of its own finding that Petitioner obtained a statement from a person while he was under sedation. That issue was not presented at trial, the finding is devoid of any support in the record, and the court could not rationally make the finding.

STATEMENT OF THE CASE

The genesis of the three related federal court actions that bring Petitioner to this Court for the second time was an automobile-truck collision on a northern Indiana highway on the morning of October 2, 1965. The automobile driver, Thomas Penman, was returning to Chicago to reenlist in the service after a five-day stay in Cincinnati, where his mother and a number of other relatives lived (Tr. 108-110). On the previous night, Penman had borrowed the car in Cincinnati from his brother-in-law, Slyvester Griffin, for a 1-2 mile trip to take a girl home (Tr. 117, 121). He decided a few hours later, without asking Griffin (Tr. 107, 135), to drive the car to Chicago, and on that trip he collided with a truck driven by Respondent's decedent.[1]

Petitioner ("Motorists") is an Ohio casualty insurance company facing a judgment, affirmed by the court below, in the principal amount of approximately $270,000. That

[1] References to "Tr." pages are to the transcript of trial in this action, filed as part of the record with this Court. References to "Respondent" are to Teresa Simpson, the decedent's widow. The remaining respondents are Mr. and Mrs. Simpson's children, jointly represented with Mrs. Simpson throughout this particular action but not parties to the related actions described below.

judgment was entered in this diversity action brought by Respondent, as administratrix of the decedent, claiming that (1) Motorists was liable, to the extent of the limits of an insurance policy issued to Sylvester Griffin, to pay a previous judgment entered against Thomas Penman as driver of Griffin's automobile, and (2) that Motorists also was liable for bad faith in refusing to settle the previous action for the $10,000 policy limit. The basis for the judgment against Motorists on both counts of the complaint was that Penman, as either a resident relative of Griffin or a permissive user of Griffin's automobile, was insured under the policy issued by Motorists to Griffin in Ohio, and also that it was bad faith for Motorists to elect to litigate the issue of coverage in the earliest stage of this three-case series of litigation rather than accepting Respondent's demand to settle for the full coverage amount under the insurance policy.

This action was tried to a jury in the Southern District of Indiana with no live testimony. The record consists of a number of documentary exhibits and a 235-page transcript consisting of testimony, read to the jury by counsel, that had been given by driver Penman and owner-insured Griffin in depositions and at trial in two previous actions, both in the Northern District of Indiana.[2] The first of those previous actions, the "Tort Case," had been brought by Respondent against Penman and Griffin in October 1965, about three weeks after the automobile accident in which Penman hit the truck driven by Respondent's decedent. The Tort Case resulted in a January 1967 judgment against driver Penman in the amount of $210,000. Judgment was entered in favor of Griffin, however, the court having rejected Respondent's claim that Penman was driving Griffin's automobile as

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[2] Counsel for both parties also read portions of one deposition that had been taken in this action, that of Mr. Paul Somers, General Counsel of Motorists Mutual.

Griffin's agent.[3] The second previous action, the "Declaratory Judgment Case," had been brought by Motorists against Respondent in July 1966, seeking to establish that Penman was not a resident relative of Griffin or a permissive user of Griffin's automobile at the time of the accident, so that Motorists had no liability under the policy issued to Griffin and was not obligated to continue defending Penman in the then-pending Tort Case.[4]

Motorists had unsuccessfully sought, over Respondent's objection, to advance the trial of the Declaratory Judgment Case to obtain a judgment prior to conclusion of the Tort Case (App. A, at 8a). Ultimately, in August 1967, the court entered a judgment in favor of Motorists, finding that, under applicable law, Penman was not a resident relative or a permissive user of Griffin's automobile at the time of the accident and was thus not subject to coverage under the policy issued to Griffin. The lengthy Memorandum of Decision and Judgment filed by the Court, containing detailed findings of fact and con-

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[3] In that Tort Case, Motorists was not a party, but its counsel defended both Griffin and Penman in that Respondent had alleged that Penman was acting as agent of Motorists' insured, Griffin (App. A., at 2a). In advising both Griffin and Penman that it would provide a defense for them in the Tort Case, Motorists advised both in writing that it disclaimed any coverage of Penman under the policy issued to Griffin and advised Penman that it would not pay any judgment against him, that it reserved the right to withdraw its defense after notice to him, and that he was entitled to employ his own attorney to assist in defending him (Tr. 47-51, 181). Penman did not respond to any of Motorists' letters, nor did he ever initiate any communication of any sort with Motorists (Tr. 204).

[4] The dilemma faced by an insurance company when the pleadings in an action, however erroneous, assert coverage under a policy and thus require the insurer to provide a defense was discussed in testimony by Motorists, but that testimony was excluded (Tr. 190-192). That dilemma has produced much litigation of subsequent "bad faith" claims. *See e.g., Martin* v. *Travelers Indemnity Company*, 450 F.2d 542 (5th Cir. 1971); 7A APPLEMAN, INSURANCE LAW & PRACTICE § 4686 (1962); Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954).

clusions of law, is attached hereto as Appendix D. That Memorandum is the "Exhibit N" that was not permitted to be introduced or referred to in this action. See App. C, at 14a-15a.

Motorists would not be subject to the present $270,000 judgment but for the fact that the judgment in the Declaratory Judgment Case was reversed on appeal by the Court of Appeals, *Motorists Mutual Insurance Company* v. *Simpson*, 404 F.2d 511 (7th Cir. 1968), solely on the ground that the case involved no more than $10,000 and thus was not within the District Court's subject-matter jurisdiction. Indeed, the "bad faith" count of the complaint in this action, which accounts for $200,000 of the judgment, had been filed by Respondent as a compulsory counterclaim in the Declaratory Judgment Case. In reversing in the Declaratory Judgment Case, the Court of Appeals noted its conflict with decisions of other circuits and of this Court as to the effect of a compulsory counterclaim on the jurisdictional amount, 404 F.2d at 514, but it refused to apply those cases on the ground that Respondent really did not want to try her claims in federal court. 404 F.2d, at 515. Motorists petitioned for certiorari in light of the admitted conflicts, but this Court, with Mr. Justice Fortas noting his dissent, denied the petition. 394 U.S. 988 (1969).

Shortly before the denial of certiorari, Respondent brought this action in a state court in Indiana, and it was removed without objection to the Southern District.[5] As we have noted, the evidence read to the jury in this action was from transcripts upon the basis of which the Northern District had held, in the Tort Case, that Penman was not Griffin's agent in driving the automobile

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[5] As to the principal claim, the "bad faith" claim of count II, Respondent sued as assignee of Penman, under a March 1967 document in which Penman recited that he was "totally unable" to pay the $210,000 Tort Case judgment and that Motorists had "neglected" to settle the case for the $10,000 policy amount (Tr. 86).

and from which the Northern District had found, in the Declaratory Judgment Case, that Penman was not covered by the policy under any theory. We will never know precisely what the jury here found from that cold record, since the District Court refused Motorists' tendered special interrogatories. The jury obviously differed from the findings of the Northern District, which had observed Penman and Griffin as live witnesses, since the jury rendered a verdict for Respondent on the coverage issue. It also returned a verdict for $200,000 on Respondent's "bad faith" claim. Again, the District Court's refusal of special interrogatories makes it impossible to determine what led the jury to that conclusion, but we do know two critical factors from this record: First, the District Court refused to instruct the jury on the applicable law regarding "bad faith," which, as we note below, is clear. Instead, it instructed only that bad faith is "an indefinite term" and is different from good faith. (See p. 9, *infra.*) Second, it refused to permit the jury to learn, through the Memorandum of Decision and Judgment in the Declaratory Judgment Case, through admissions made by Respondent of the fact of that judgment, or through any reference by Motorists, that Motorists' attempt to resolve the coverage issue through the Declaratory Judgment Case was not merely a frivolous and dilatory tactic but rather a claim of non-coverage that had been sustained by a federal court.

On appeal to the court below, that court affirmed in an opinion that we shall discuss in some detail in that it provides the basis for this petition. We shall not discuss all of the issues on appeal or the opinion's treatment of those issues, but rather restrict ourselves to three points: (1) the treatment of the instructions on "bad faith"; (2) the rationale for excluding any evidence as to the outcome of the Declaratory Judgment Case; and (3) the findings of fact made by the Court of Appeals as to Motorists' treatment of Mr. Penman.

The opinion of the Court of Appeals recognized that Ohio law governed, that three decisions of the Ohio Supreme Court over the last 23 years had established clearly the standard of "bad faith" in claims against insurance companies, and that the standard " 'embraces more than negligence, and imports a dishonest purpose or conscious wrongdoing.' " (App. A., at 6a.) The opinion also stated that Motorists had been denied the instruction "approved by the Supreme Court of Ohio in *Wasserman* [v. *Buckeye Union Casualty Co.*, 32 Ohio St. 2d 69, 290 N.E.2d 837 (1972)], (App. A, at 6a), but found no error in that the District Court's instruction "incorporated the principal elements of bad faith as viewed by the Ohio Courts." (App. A, at 6a.) The square holding of the court in *Wasserman* was as follows, 290 N.E.2d, at 838:

> "A charge to a jury on the issue of 'bad faith' in an action by an insured against his insurer to recover the amount, in excess of the policy limit, of a judgment rendered against him in a tort action, which quotes verbatim paragraph two of the syllabus in Slater v. Motorists Mutual Ins. Co., 174 Ohio St. 148, 187 N.E.2d 45 [1962], is a complete and correct statement of the law of Ohio and a proper charge to the jury."

That instruction, which Motorists had requested in this action, is as follows, 290 N.E.2d, at 840:

> " '2. A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.' "

The instructions of the District Court, which the court below found to "incorporate the principal elements" of Ohio law, were as follows:

> "The defendant is charged with a duty to represent its insureds in good faith and failure to do so is 'bad faith.' Bad faith is a general and somewhat indefinite term.
>
> "In evaluating the propriety of settlement when the interest of the company and the insured may differ, the interest of the insured must be given at least equal consideration. With respect to the decision whether to settle or try the case, the insurance company must in good faith view the situation as it would if there were no policy limit applicable to the claim. Failure to meet this standard of conduct is bad faith.
>
> * * * *
>
> "An insurance company has no duty to settle each and every claim against an insured simply because the insured had been involved in an accident resulting in injury to another. Failure to settle, in and of itself, is not necessarily determinative as to whether the company has breached a duty to the insured.
>
> "The standard which determines whether or not an insurance company may be held liable for an excess judgment is simply good faith dealing with the insured." (Tr. 228.)

The second critical aspect of the opinion below relates to the exclusion of the memorandum opinion of the Northern District in the Declaratory Judgment Case (App. D) and of admissions of Respondent (a) that the Case had resulted in a judgment that Penman was not covered under the policy and (b) that that judgment was reversed solely on jurisdictional grounds (Tr. 187-192). In the opinion as originally filed (App. A), the court below treated that matter as follows:

> "At this point [the reversal on jurisdictional grounds], the district court's judgment in the declaratory judgment action became a nullity and was hardly admissible in the instant case on the coverage issue. *While it may have had some probative value with respect to the issue of bad faith, the defendant did not offer the evidence for that purpose.* Moreover, the defendant was permitted to show that it had commenced a declaratory judgment action on the coverage questions and had asked that action be advanced for speedy hearing. Defendant was further permitted to introduce the entire correspondence between itself and its attorneys with respect to the declaratory judgment action. Accordingly, we find no error in the evidentiary rulings on this point." (App. A, at 8a.) (Emphasis added.)

In the opinion as published, 494 F.2d at 854, the sentence emphasized above has been deleted, for reasons that are, in a sense, described in the order of the court below on rehearing (App. C). The court was faced with Motorists' record citation (Tr. 187) showing that it had specifically offered the Memorandum Opinion in the Declaratory Judgment Case in connection with count II of the complaint, which the court's earlier opinion had correctly characterized as the "bad faith issue" (App. A., at 3a), as had the District Court (Tr. 222). The court found an "ambiguity" (App. C, at 14a), however, since the bad faith count in the complaint, in its first paragraph, incorporated by reference several paragraphs of count I, including an allegation of coverage under the policy. In order to remove that "ambiguity," the court simply deleted the sentence emphasized above, so that the opinion no longer states that the exhibit may have probative value as to the bad faith issue, no longer indicates that it was or was not offered on that issue, and leaves as support for the exclusion on that issue the court's statement that Motorists was permitted to tell the jury that it had sued Respondent and "was further permitted to

introduce the entire correspondence between itself and its attorneys with respect to the declaratory judgment action." (App. A, at 8a.) Motorists did not offer *any correspondence at all* between itself and its attorneys in this action. The correspondence to which the court refers is the correspondence offered by *Respondents* over Motorists' attorney-client privilege objections, which objections the court rejected later in its opinion (App. A, at 9a), and that correspondence nowhere referred to the judgment in the Declaratory Judgment Case.

Finally, we turn to a finding of fact made by the court below which, as the opinion indicates, heavily influenced its decision.[6] In stating that the record was "particularly strong" and "resounding[ly] supports" a finding of bad faith, the court emphasized that a Motorists' adjuster obtained a statement from Penman "but was unable to validate it with clearance from hospital authorities since Penman was under the influence of drugs at the time his siganture was obtained." (App. A, at 6a.) It also emphasized that "defendant's representative attempted to procure from an injured and sedated Penman information which would favor only the defendant's interests." (App. A, at 7a.)

This is what the record in this action shows, *in toto*, about the statement of Thomas Penman (see Tr. 100-103), taken four days after the accident and about six

[6] The court's opinion contains other statements of fact that are clearly erroneous, but we note here only one of them, in which the court found bad faith from Motorists' "withholding critical information from" Penman concerning the specific amount of the policy limits (App. A, at 8a). Uncontradicted evidence in the record establishes that Penman never sought any information from Motorists nor responded to any communications from it (Tr. 204). Penman was never asked in any testimony whether or not he knew or cared what the policy limits were (the policy was, of course, in the possession of his brother-in-law, Griffin), and, finally, under Ohio law, Motorists could not be in bad faith even if it had refused to disclose those limits. *Slater* v. *Motorists Mutual Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962).

days before Penman left the hospital (Tr. 114): The statement was admitted in evidence without objection by Respondent (Tr. 97). The statement, over Penman's signature, recites that "I have some broken ribs and abrasions to knees. I am not under sedatives at this time." (Tr. 102). No evidence from the hospital records was offered as to Penman's condition at the time of the statement. In Penman's testimony in the Declaratory Judgment Case, read to the jury in this action, Motorists cross-examined him about the statement which he remembered and did not repudiate. Nothing was stated on direct or cross examination about sedation (Tr. 180). In none of the other testimony of Penman is there any reference to sedation, or, for that matter, to anything else that might be asserted to impair Penman's competence at the time of the statement. The adjuster who took the statement was not called as a witness. In the instructions to the jury as to issues that it was to determine, nothing was said as to sedation or to any issue of Penman's condition at the time of the statement (Tr. 220-235). Respondent's Exhibit 9, an internal Motorists' "Review for Trial," (see Tr. 59-61), contains a lengthy status report (attached as Appendix E) including the following sentence (Tr. 61):

> "The co-defendant was contacted in the hospital and his statement obtained due to the effect that he did not have permission to drive to Chicago but the statement was taken without clearance from the hospital authorities to the effect that the co-defendant was not under the influence of any drugs or sedatives." (App. E, at 59a.)

In sum, in the entire record in this case, the words "drugs" or "sedatives" or similar words appear only in this one sentence from an internal Motorists' memorandum, and it must have been from that one sentence that the court below somehow concluded that Penman was *in fact* under the influence of drugs and that Motorists

attempted and failed to obtain a clearance from the hospital.[7]

REASONS FOR GRANTING THE WRIT

We are well aware that this Court's certiorari jurisdiction is not a vehicle for securing the correction of errors of primary importance to the litigants rather than the public or for seeking a second appellate review of evidentiary rulings. But the basic justification for the discretionary nature of certiorari jurisdiction assumes one appeal of right that meets certain minimal standards of fairness, and not one that "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Rule 19(b). See *Saldana* v. *United States*, 365 U.S. 646 (1961); *Gibson* v. *Lockheed Aircraft Co.*, 350 U.S. 356 (1956). We suggest—indeed, we urge—that the two opinions of the court below (App. A and C), in light of the record here, show that Motorists had no hearing

[7] In addition to the opinion of the court below, by Senior District Judge Campbell, a brief concurring opinion was written by Judge Pell. That opinion states that Judge Pell concurs in the majority opinion because, accepting the evidence favorable to Respondent, "the insured here did not get that for which he paid his premium." (App. A, at 9a.) In Judge Pell's view, since the jury "could well have concluded" from the evidence that Motorists would have accepted a settlement offer if Sylvester Griffin had been driving the automobile, and since Sylvester Griffin "paid for equal coverage for a permissive user or for a relative residing in his household" (App. A, at 10a), Mr. Griffin did not get what he paid for. Judge Pell's opinion does not point out that Sylvester Griffin was not a party to this action, that Respondent was not suing as assignee of Griffin but rather of Penman, that, for his premium, Sylvester Griffin received from Motorists a defense in the Tort Case resulting in a final judgment that he was in no way liable to Respondent or others for any damages resulting from the automobile accident, and that Sylvester Griffin executed a statement a few days after the accident—which he never repudiated—stating facts upon which Motorists made its decision that Penman was not insured under the policy (Tr. 97-100; App. E).

in the court below that accords with even the most minimal standards of fairness. We state that position with reluctance and with due reference to that court and its heavy workload, but we state it nonetheless. Thus, while it is unlikely that other cases will present the particularly bizarre coalescence of factors involved in this one, the issues presented here are of general importance in that they involve the basic question of the minimal standards that a federal court must meet in the adjudication of an appeal in order to avoid "an abdication of the judicial function . . . ." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957).

The most arbitrary action of the court below was in dealing with Motorists' effort to show the jury that it sincerely doubted from the point of its initial investigation that Penman was entitled to coverage under the policy, that it sought to resolve that issue expeditiously through the Declaratory Judgment Case, and that it was sustained in its beliefs by the judgment of the Northern District, which was reversed solely on jurisdictional grounds. Two other circuits have held, under Ohio law (which the court below recognized to apply here) and under the substantially identical law of Mississippi, that an insurance company is not liable for bad faith in refusing a settlement offer and insisting upon litigating the issues of liability or coverage, when its position on those issues is not groundless or disingenuous. *Stevens* v. *Northwestern Nat. Cas. Co. of Milwaukee*, 305 F.2d 513 (6th Cir. 1962); *Martin* v. *Travelers Indemnity Company*, 450 F.2d 542 (5th Cir. 1971). Indeed, the basic facts of *Travelers* are similar to those here, and the Fifth Circuit's recognition of the problems faced by an insurance company with a legal requirement of defending a person who it believes is not an "insured" under its policy furnishes a striking contrast to the treatment by the court below.

The heart of Motorists' defense on the bad faith claim was that its position as to non-coverage was a substantial one, and the fact that its position was sustained in the Declaratory Judgment Case was the critical evidence. Yet the court, in reviewing the exclusion of the evidence, began with a clearly erroneous statement in its opinion that the evidence was not even offered on the issue of bad faith and then attempted on rehearing to justify that statement by suggesting that the clear offer on Count II—the bad faith claim—was really meant to refer back to a Count I allegation. To resolve its dilemma, the court merely deleted the sentence in its original opinion in which it had conceded the probative value of the evidence as to the bad faith claim and stated the basis for excluding the evidence. After the court's editing, the opinion is left with one factor as a justification for the exclusion—the court's statement that Motorists was permitted to introduce other evidence in the form of correspondence. But the "correspondence" to which the court refers (App. A, at 8a), does not say anything about the outcome of the Declaratory Judgment Case and was in fact correspondence offered by *Respondents*, the erroneous admission of which was one of Motorists' grounds for appeal —a ground later dealt with in the opinion.

Appellants in the federal courts may not be entitled to rulings that are correct. They are, we suggest, entitled to rulings that are not clearly irrational or arbitrary, and the court's treatment of the exclusion of the critical evidence here in its two opinion (App. A and C) fails to meet that minimal standard and requires the exercise of this Court's supervisory powers.

As to the issue of the instructions on bad faith, we suggest again that the standard of bad faith and the instruction on that issue which the court admitted to be the declared law of Ohio cannot rationally be determined to be "in conformity" with the instructions here

(App. A. at 6a). The whole point of each of the three Ohio cases cited by the court (App. A. at 5a) is that "bad faith" under Ohio law is not the same as negligence or bad judgment. Indeed, the Supreme Court of Ohio had reiterated only fifteen months before the decision of the court below that one instruction to be given a jury as to bad faith, in order to give an accurate statement of the law, must state the elements of "dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." See p. 8, *supra*. The instruction here, see p. 9, *supra*, contained none of those elements, defining bad faith only as failure to act in "good faith." In that light, we cannot conceive how the court below could find, as it stated, that the instruction given by the District Court for the Southern District of Indiana "incorporated the principal elements of bad faith as viewed by the Ohio Courts." (App. A. at 6a.)[8]

Finally, we turn to the heavy reliance of the court below upon its findings that Motorists had attempted to overreach an "injured and sedated Penman" while he was in the hospital. See p. 11, *supra*. This Court has on other occasions specifically rejected characterizations by the court below that were without any support in the record, see *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 289 (1963); and it also has established that courts may not render decisions that are totally devoid of evidentiary support. *Douglas* v. *Buder, Judge*, 412

[8] If this action had been tried in a federal court in Ohio, the question of jury instructions very probably would not have arisen. See *Stevens* v. *Northwestern Cas. Co. of Milwaukee*, 305 F.2d 513, 514 (1962), in which the Sixth Circuit, applying Ohio law, affirmed summary judgment in favor of the insurance company. The court held that, since the company believed there was no liability and since the case—which the company ultimately lost—involved "substantial questions," the company could not be in bad faith as a matter of Ohio law in refusing to settle and exercising its right to try the case.

U.S. 430 (1973); *Garner* v. *Louisiana*, 368 U.S. 157 1961); *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960). It is plain from the opinion of the court that its findings that a statement was obtained from Penman while he was in fact under sedation and that Motorists was "unable to validate it" with the hospital were the key elements in its affirmance on the bad faith issue; yet, as we have shown, see pp. 11-13, *supra*, there is simply no evidence in the record from which the court could rationally draw those conclusions. There was no issue at the trial as to Penman's statement, and the only reference in the entire record is the single sentence in Motorists' internal memorandum, after the home office had reviewed the file, noting that the adjuster had failed to seek clearance from the hospital as to the Penman statement. See p. 12, *supra*. This Court many times has rejected, as unconstitutional, statutory presumptions of an ultimate fact from a basic fact in the absence of a rational connection between them. *See*, e.g., *U.S. Dept. of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973). Surely the minimally acceptable standards for adjudication in federal appellate courts must require that those courts not rest their decisions upon such irrational presumptions in the form of findings of fact.

CONCLUSION

As we have shown, the judgment of the court below was so arbitrary that Petitioner was deprived not only of a trial on the basic issues involved in this litigation, but also of any meaningful appeal. In these circumstances, we suggest that it would be appropriate for this Court, in the exercise of its supervisory powers, to grant the petition for a writ of certiorari, to reverse the judgment of the court below summarily, and to remand the case for a new trial at which Petitioner would be permitted to introduce the principal evidence relevant to its case and in which the jury would be instructed on the basis of the clearly applicable law.

Respectfully submitted,

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August 16, 1974

APPENDICES

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 APRIL SESSION, 1973

No. 72-1702

TERESA SIMPSON, Administratrix of the ESTATE OF RAYMOND K. SIMPSON, deceased, and RANIO SIMPSON, GARY SIMPSON and JO ANN SIMPSON, by their next friend, FRANCIS BENOIT,

Plaintiffs-Appellees,

v.

MOTORISTS MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana. Indianapolis Division.

No. IP 69-C-56

JAMES E. NOLAND, *Judge.*

ARGUED JUNE 7, 1973—DECIDED MARCH 27, 1974

Before PELL and SPRECHER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

CAMPBELL, *Senior District Judge.* Plaintiff's decedent was killed in an automobile accident caused by the negligence of Thomas Penman, Jr. who was driving a vehicle owned by Sylvester Griffin. Griffin was insured by the defendant Motorists Mutual Insurance Company. In a prior negligence action, the plaintiff sued Penman and Griffin for wrongful death, and the jury there returned a verdict in favor of the plaintiff and against Penman in the amount of $210,000.00.[1] Motorist Mutual provided Penman a defense to the prior cause of action, but at all times denied coverage to him under the policy. Following the conclusion of the prior action, Penman assigned his rights under the policy to the plaintiff herein and this suit was commenced.

The plaintiffs' complaint is stated in two counts, the first alleging that Penman was an insured under Motorists Mutual's policy of insurance which provided $10,000.00 of coverage, and the second charging that Motorists Mutual acted in bad faith in refusing to pay its $10,000.00 policy limit in settlement of the plaintiff's wrongful death claim against Penman. Under count 1 of the complaint, the plaintiff sought the $10,000.00 policy coverage, plus interest on the entire $210,000.00 tort judgment, and sought the balance of the tort judgment in count 2. The jury returned a verdict in favor of the plaintiff on both counts, awarding her the $10,000.00 policy coverage, plus interest of $59,386.84 on the full tort judgment, under count 1, and under count 2 awarded the plaintiff the balance of the tort judgment, amounting to $200,000.00. The defendant appeals from that verdict and the subsequent judgment entered thereon.

Under the terms of the insurance policy, coverage was extended to the named insured, Sylvester Griffin, and within the definition of "first-named insured" any

[1] The cause against the defendant Griffin resulted in a directed verdict in his favor.

relative of either the insured or his spouse while such relative was a resident of the insured's household. The policy also covered any person using the insured's automobile provided such use was by or with the permission of the named insured.

The coverage issues in count 1 of the complaint were tried on the alternative theories that Penman was either a relative residing in the household of the named insured or was a permissive user. The bad faith issue stated in count 2 of the complaint was tried on several factual theories, including that the defendant had abused Penman's position in the prior tort action in order to obtain admissions from him relative to the coverage questions, had failed to communicate properly to Penman the settlement offer in the tort case, and had refused to disclose to Penman the policy limits or the coverage provisions of the policy.

While the defendant raises numerous issues on appeal, the principal thrust of its position is directed toward the sufficiency of the evidence to support the jury's verdict. In this regard, error is assigned to the district judge's denial of the defendant's motion for a directed verdict at the close of all of the evidence, and the defendant's post-trial motion for judgment notwithstanding the verdict. Viewed in its light most favorable to plaintiff, we conclude that the evidence contained more than ample support for the jury's verdict.

The record shows that in July of 1965, Penman was discharged from the Navy after ten years of service. At the time of his discharge, he had been stationed in Chicago. He then returned to Cincinnati, bringing all of his personal effects with him. Upon arriving in Cincinnati, he visited briefly with his mother in her Cincinnati apartment. On that occasion, Penman's sister, Mrs. Sylvester Griffin, invited him to take up residence with her and her husband and child at their home in Cincin-

nati. Penman stored his Navy clothing in one of his mother's empty rooms, and went to the Griffin household where he lived with them for a period of approximately two weeks. While living with the Griffins, Penman slept in the Griffin household, took his meals there with the family, and kept all of his civilian clothing at the Griffin household.

After approximately two weeks, Penman went back to Chicago for several weeks, returning to the Griffin household on September 27, 1965. His plans for the future were uncertain at that time, and he discussed with the Griffins the possibility of re-enlisting in the Service. He stayed with the Griffins until the evening of October 1, 1965. On that evening, Penman asked Griffin if he could use his car, and Griffin willingly gave Penman his permission. Penman did not state the purpose for which he intended to use the car, nor did Griffin place any limitation on its use.

On the evening of October 1st, Penman and a woman named Ann Berry apparently spent the evening and part of the next day's early morning hours in a Cincinnati restaurant and lounge. Penman then took the woman home and drove to his mother's house where he awakened his sister, Jewel Green, and in the early morning of October 2, 1965, they left Cincinnati in Griffin's automobile and drove towards Chicago. Penman stated that his purpose in going to Chicago was to re-enlist in the Navy. The accident resulting in the death of plaintiff's decedent occurred in Benton County, Indiana, as Penman and his sister were traveling towards Chicago.

Penman was hospitalized for a period of time after the accident, and upon his discharge from the hospital he returned to the Griffin household. Sylvester Griffin never raised any question concerning Penman's use of the automobile. Also, when Griffin filed his proof of claim with Motorists Mutual on October 4, 1965, the Monday

following the accident, he listed Penman's residence as the Griffin household.

This evidence strongly supports the jury's verdict on the coverage questions. The jury was adequately instructed on the legal significance of the terms residence and permission. Under the set of facts outlined above, the jury could easily have concluded that Penman was either a permissive user or a relative of the insured residing in his household, or both.

With respect to the bad faith count, we feel that the evidence is equally compelling in the plaintiff's favor. Concerning the liability of an insurer in this situation, we wish to note our agreement with the defendant that it is the law of Ohio, rather than Indiana as urged by the plaintiff, which governs the scope of the defendant's liability in this case. The contract of insurance here, entered into in the State of Ohio, provided coverage to an Ohio resident for a vehicle registered in Ohio. Moreover, the conduct giving rise to the permission to use the vehicle and to Penmans' residency occurred in Ohio. Only the underlying tort occurred outside of Ohio.

The decisions of the Supreme Court of Ohio provide that in order for an insured to recover the amount of a judgment rendered against him in a tort action in excess of the policy limit, the insured must prove a lack of good faith on the part of the insurer either in negotiations respecting a settlement of the claim against the insured or in the conduct of the trial of the tort action on behalf of the insured. *Wasserman* v. *Buckeye Union Casualty Co.*, 32 Ohio ST. 2d 69, 290 NE 2d 837 (1972); *Slater* v. *Motorists Mutual Insurance Co.*, 174 Ohio ST. 148, 187 NE 2d 45 (1962); *Hart v. Republic Mutual Insurance Co.*, 152 Ohio ST. 185, 87 NE 2d 347 (1949). While acknowledging that "bad faith" is a term not susceptible to concrete definition, the Ohio courts have indicated that it

embraces more than negligence, and imports a dishonest purpose or conscious wrongdoing. *Wasserman* v. *Buckeye Union Casualty Co.*, 32 Ohio ST. 2d 69, 290 NE 2d 837, 840 (1972). We have examined the district judge's instructions on the issue of bad faith and find them to be in conformity with the Ohio courts' definition of the term. While the defendant complains that the district judge refused its tendered instruction, which was approved by the Supreme Court of Ohio in *Wasserman*, we find no error in the district court's charge to the jury since it incorporated the principal elements of bad faith as viewed by the Ohio courts.

The evidence of bad faith in this record is particularly strong. The defendant knew certainly after the accident that it resulted from Penman's negligence and that the damage, involving the death of a 37 year old man who left a wife and three dependent children surviving him, substantially exceeded the ten thousand dollar policy limit. As stated, Sylvester Griffin filed a proof of claim with the defendant the Monday following the accident and listed Penman's address as his household on the claim form. That same day, one of the defendant's representatives instructed an Indiana adjuster for the company to visit Penman in his hospital room and to obtain a statement from him relative to his use of the vehicle and his legal residence. The adjuster had prepared a statement inserting the declaration that Penman resided with his mother. Penman signed the statement, but the adjuster was unable to validate it with clearance from hospital authorities since Penman was under the influence of drugs at the time his signature was obtained.

Other evidence shows that although the defendant recognized Penman's liability from the outset, it attempted to avoid any payment on its part on the basis of a policy defense. Penman was advised by the attorneys retained by Motorists Mutual that the defendant would provide

a defense to him, that the suit was for an amount in excess of policy limits, that Penman was free to retain his own counsel, but that in any event Motorists Mutual denied coverage under the policy. Penman was never informed by the defendant of the specific policy limits.

Moreover, although the plaintiffs offered to settle the tort action for the policy limits, the attorneys retained by defendant rejected the policy limit offer and refused to make any payment in settlement of the claim. This was done without even consulting Penman or inviting him to participate in the negotiations in any respect. To be sure, Penman was advised of the offer and rejection, but since he had not been advised of the amount of the policy limits, or of his right to independently negotiate with plaintiff and her attorneys, he was effectively denied any opportunity to independently settle the tort litigation within the terms of the offer of settlement made by plaintiffs' attorneys.

Additionally, although Penman was advised that coverage was being denied, the sole basis of the denial was that he did not have permission to use Griffin's automobile at the time of the accident. Penman was never advised by defendant or the attorneys retained by defendant to provide Penman's defense that the insurance policy extended coverage to relatives of the insured while those relatives were residents of the insured's household.

We think this record resounding supports the jury's verdict. The defendant knew that Penman's liability was clear and that the damages were far in excess of the policy limits. Moreover, in an attempt to support its contention that Penman's use of the automobile was beyond the scope of the permission granted by the owner, defendant's representative attempted to procure from an injured and sedated Penman information which would favor only the defendant's interests. In addition, the

attorneys retained by defendant to "represent" Penman, by withholding critical information from him, deprived him of any opportunity to effectuate a reasonable settlement of the tort litigation. Bad faith, encompassing a dishonest purpose or a conscious wrongdoing, is forcefully demonstrated by this record.

The defendant also contends that certain evidence was improperly excluded from the jury's consideration. This evidence consists of certain proceedings in a prior declaratory judgment action initiated by the defendant on this same policy and pertaining to the identical coverage questions. The evidence included the findings of fact and conclusions of law entered by district Judge Eschbach in the prior declaratory action which had been filed in the district court for the Northern District of Indiana. Judge Eschbach had determined that there was no coverage of Penman on the policy in question. However, this court, upon concluding that the requisite jurisdictional amount had not been met in the prior action, reversed the judgment of the district court and remanded with direction that the suit be dismissed. *Motorists Mutual Insurance Company* v. *Simpson*, 404 F.2d 511 (7th Cir. 1969). At this point, the district court's judgment in the declaratory action became a nullity and was hardly admissible in the instant case on the coverage issue. While it may have had some probative value with respect to the question of bad faith, the defendant did not offer the evidence for that purpose. Moreover, the defendant was permitted to show that it had commenced a declaratory judgment action on the coverage questions and had asked that action be advanced for speedy hearing. Defendant was further permitted to introduce the entire correspondence between itself and its attorneys with respect to the declaratory judgment action. Accordingly, we find no error in the evidentiary rulings on this point.

Error is also assigned to the admission into evidence of certain communications between the defendant and its attorneys in the tort action. In this respect, the defendant asserted the attorney-client privilege in an effort to preclude the introduction of such evidence by the plaintiffs herein. It should be remembered, however, that the plaintiff is suing here as the assignee of Thomas Penman. The defendant's attorneys were also the attorneys for Penman in the prior action. In this situation, the law of Ohio recognizes that where the same attorney represents two parties having a common interest, and each party communicates with the attorney, the communications are privileged from disclosure at the instance of a third person. Those communications are not privileged, however, in a subsequent controversy between the two original parties. See *Netzley* v. *Nationwide Mutual Insurance Co.*, 34 Ohio App. 2d 65 296 N.E. 2d 550, 561-562 (1971).

For the reasons stated, the judgment of the district court is affirmed.

Affirmed.

PELL, *Circuit Judge*, concurring.

On principles of justice and pursuant to guidelines established in the law of contracts, courts should scrutinize very closely cases such as the present one. The courts, it appears to me, should be extremely reluctant to provide an insured, who has only paid for a minimal amount of liability insurance, with what amounts to umbrella coverage.

I do concur in the majority opinion after close scrutiny because, if we accept, as we must, the evidence favorable to the appellee, the insured here did not get that for which he paid his premium. Included in that for which he paid was coverage for a permissive user and for a

relative residing in his household. The jury could well have concluded on the evidence of this case that had the named insured been driving the vehicle at the time of the accident, the insurance company would have accepted with alacrity an offer of settlement within the policy limits. The named insured paid for equal coverage for a permissive user or for a relative residing in his household. The coverage was not afforded.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 72-1702

March 27, 1974

[Filed Jun. 19, 1974, U. S. District Court, Indianapolis Division, Southern District of Indiana, Arthur J. Beck, Clerk]

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Campbell, Senior District Judge *

TERESA SIMPSON, ETC., *et al.*,
Plaintiffs-Appellees,

vs.

MOTORISTS MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

IP 69-C-56

Opinion by Judge Campbell

This cause came on to be heard on the transcript of the record from the United States District Court for

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

A True Copy:
Teste:

/s/ William P. O'Laughlin
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

CERTIFIED: A True Copy
ARTHUR J. BECK
U. S. District Court
Southern District of Indiana

By /s/ [Illegible]
Deputy Clerk

[SEAL]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 72-1702

May 29, 1974

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Campbell, Senior District Judge *

THERESA SIMPSON, Administratrix of the ESTATE OF RAYMOND K. SIMPSON, deceased, and RANIO SIMPSON, GARY SIMPSON and JO ANN SIMPSON, by their next friend, FRANCES BENOIT,

Plaintiffs-Appellees

vs.

MOTORISTS MUTUAL INSURANCE COMPANY,
Defendant-Appellant

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 69-C-56

James E. Noland, *Judge*.

ORDER

Appellant's Petition for Rehearing contends that the Opinion of this Court in the instant appeal misapprehends

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

the record, to the extent that the Opinion states that Defendant's Exhibit N (Judge Eschbach's Findings and Conclusions in a declaratory judgment action which was subsequently reversed by this Court) was offered into evidence in the district court only with respect to the issue of coverage, and not with respect to the issue of bad faith.

Paragraph 6 of Count I of Plaintiff's Complaint alleged that Thomas E. Penman was "an insured" under Defendant's insurance policy. Paragraph 1 of Count II of the Complaint incorporated Paragraphs 1 through 8 of Count I as Paragraphs 1 through 8 of Count II. Thus, "coverage" under Defendant's policy was alleged by plaintiff both in Count I and in Count II.

Appellant asserts that the record shows that the excluded evidence was offered with respect to the issue of bad faith, citing page 187 of the Transcript of Proceedings, wherein the following statement appears:

> "Mr. Boyd: In connection with that, Your Honor, also with respect to Count No. II of the Complaint in this case, defendant offers into evidence, Defendant's Exhibit N."

The fact that "coverage" was alleged both in Count I and Count II, and the entire context within which the quoted statement was made, creates an ambiguity as to whether the evidence was offered with respect to the issue of coverage alleged in Count II, or with respect to the issue of bad faith, also alleged in Count II, or both.

In view of this ambiguity, the published opinion in the instant appeal will be amended so as to delete the following sentence, found at page 7 of the slip opinion:

> "While it may have some probitive value with respect to the question of bad faith, the defendant did not offer the evidence for that purpose."

For the other reasons stated in the first full paragraph at page 7 of the slip opinion upholding the district court's exclusion of Defendant's Exhibit N, this court reaffirms its previous ruling that the exclusion of this evidence was not error.

On consideration of the petition of the appellant for a rehearing by the court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellants for a rehearing in the above-entitled appeal be, and the same is hereby denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA,
HAMMOND DIVISION AT LAFAYETTE

Lafayette Civil No. 363

MOTORISTS MUTUAL INSURANCE COMPANY,
Plaintiff,

v.

THE HERTZ CORPORATION, TERESA SIMPSON,
ADMINISTRATRIX,
Defendant.

MEMORANDUM OF DECISION AND JUDGMENT

This action for declaratory relief was commenced by the plaintiff, Motorists Mutual Insurance Company, an Ohio corporation, against the defendants, The Hertz Corporation and Teresa Simpson, Administratrix of the Estate of Raymond K. Simpson, deceased. This cause came on for trial on June 26, 1967 and was tried to the court without the intervention of a jury.

Plaintiff brings this suit for the purpose of seeking a declaration of non-liability under a certain policy of automobile liability insurance, policy number 1.350106F10, issued December 10, 1962 to one Sylvester Griffin of Cincinnati, Ohio. On the morning of October 2, 1965, on U.S. Highway No. 52 north of Templeton, Indiana, in Benton County, and while the above insurance policy was in full force and effect, the insured automobile, a 1960 Oldsmobile owned by Griffin, was involved in an automobile-truck collision. As a result of said collision, the defendant Teresa Simpson's decedent was killed. The insured automobile was, at the time of the accident, being

driven by one Thomas E. Penman, Jr., Griffin's brother-in-law.

In a separate action tried to this court at an earlier date, the same being Lafayette Civil No. 332, The Hertz Corporation and Teresa Simpson, Administratrix, the defendants herein, recovered a judgment against the driver of said vehicle, Thomas E. Penman, Jr. Hertz and Simpson claim that Penman was covered as an "insured" under Griffin's policy of automobile liability insurance. Plaintiff, Griffin's insurer, contends on the other hand that Penman is not covered under its policy. This action was commenced in order to resolve this issue of coverage.

This court has determined that under the terms of the automobile liability insurance policy involved in this litigation, under the particular facts and circumstances of this case, and in light of the applicability of Ohio law to the construction of the relevant terms of the insurance policy herein involved, no coverage exists under said policy of insurance with respect to Thomas E. Penman, Jr.

At the outset, the court would dispose of defendants' attack on the court's jurisdiction over the subject matter of this litigation. Defendants argue, in substance, that inasmuch as the Griffin insurance policy had limits, with respect to this case, of $10,000.00 for bodily injury or death and $5,000.00 for property damage, it is only by virtue of an impermissible aggregation of claims of two separate and distinct claimants—namely, Simpson and Hertz—that plaintiff can exceed the amount of $10,000.00, exclusive of interest and costs, as required by 28 U.S.C.A. § 1332(a). Defendants' argument has superficial plausibility, but it goes no farther. This is a declaratory judgment action brought by a *single* party, the insurer of the subject automobile, wherein said party is

exposed to a total potential liability under this *single* policy of insurance. The accident out of which plaintiff's potential liability arises was a single occurrence, and plaintiff's liability or non-liability under the instant policy of insurance will likewise be decided as a single matter. *Franklin Life Insurance Co.* v. *Johnson*, 157 F. 2d 653 (10th Cir. 1946).

Generally, in a declaratory judgment action, it is the value of the liability of which plaintiff seeks to be relieved which determines the jurisdictional amount. See, e.g., *Davis* v. *American Foundry Equipment Co.*, 94 F. 2d 441 (7th Cir. 1938), and *Trinity Universal Ins. Co.* v. *Woody*, 47 F. Supp. 327 (D.C. N.J. 1942). Properly speaking, it is plaintiff's entire potential liability under its insurance policy, which liability turns on a construction of the terms of its insurance policy, which is the actual matter in controversy in this action. See *Government Employees Insurance Company* v. *Lally*, 327 F. 2d 568 (4th Cir. 1964). This potential liability, or, stated another way, the pecuniary result to the plaintiff which a judgment in this action would directly produce, is without question in excess of the required jurisdictional amount, *Trail* v. *Green*, 206 F. Supp. 896 (D.C. N.J. 1962), inasmuch as the defendants herein are asserting both personal injury and property damage claims which, individually, exceed the policy limits of $10,000/$20,000 and $5,000, respectively.

The court holds that it has subject matter jurisdiction of the instant controversy.

With respect to the merits, plaintiff's position is classic. Plaintiff contends that Thomas E. Penman, Jr., the driver of the insured automobile, is not covered under the Griffin liability insurance policy on account of his not being able to qualify as an "insured" within the meaning of any of the terms of said insurance policy.

The insurance policy in effect at the time of the automobile accident of October 2, 1965 extends coverage and protection, to the extent therein provided, to the "insured." And, under "Insuring Agreement III" at page 6 of the policy, the word "insured" is defined. Only two of the definitions therein contained are immediately relevant for purposes of the case at bar.

In paragraph "a.4" of "Insuring Agreement III," the term "insured" is defined to mean

> "any person while using the automobile . . ., provided the *actual use* of the automobile is by or *with the permission* of a named insured . . ., *except* that such permission is *not required of the 'first-named insured'* . . . ." (Emphasis added.)

Under Paragraph b of the same section of the policy, the term "first-named insured" is defined as

> "the individual first named in the declarations and *while a resident* of such individual's household, the spouse of such person and any *relative* of either." (Emphasis added).

Plaintiff contends, simply, that at the time and place of the Penman-Simpson accident, Thomas E. Penman, Jr., was not using the insured automobile with Griffin's "permission" and that neither was he a "first-named insured" within the meaning of that policy term inasmuch as he was not a "resident" of Griffin's household.

I. *The Facts*

The named insured, Sylvester Griffin, was Thomas E. Penman's brother-in-law, having married Penman's sister Gladys in August, 1964. Griffin and his wife resided at 860 Glenwood, Cincinnati, Ohio. In July of 1965, Penman, who had been in the United States Navy for a period of a little over ten years and, since 1963, stationed at the Great Lakes, Illinois, Naval Station, was

discharged from the Navy. Penman went to Cincinnati. In 1963, Penman had been married, but by the time of his discharge in 1965, he had been divorced, and his former wife and two children lived in San Pedro, California. He did, however, leave the California address as his forwarding address. His purpose in coming to Cincinnati was to visit his relatives.

Upon arrival in Cincinnati in July 1965, Penman was met at the bus station by a sister, Lois Tillery, who drove him immediately to his mother's home at 817 Mann Place. Penman had with him his Navy sea bag, his trunk, some civilian clothes, his Navy dress suit, and some personal belongings. These were all brought to and deposited at Penman's mother's house.

Living at Penman's mother's house in July of 1965 were approximately ten persons, including Penman's mother, his sister (Jewel Green) and her six children, Gladys Griffin's brother (Robert Patterson), and Penman's stepfather. To accommodate these people were four bedrooms; however three of the four bedrooms were, for all practical purposes, unfurnished. Conditions there were quite obviously crowded.

Griffin's residence was located close to Penman's mother's house and could be reached very quickly from the back, across the alley. The Griffins were acquainted with Penman's mother. On the evening of Penman's arrival, the Griffins came over, and Gladys Griffin invited Penman to sleep at their (Griffin's) house, for although the Griffins had only two bedrooms, there was only Mr. and Mrs. Griffin and one child staying there. Penman agreed, and subsequently spent his nights at the Griffins until he left Cincinnnati some two weeks later. During the time that he slept at the Griffins, Penman shared a bedroom with Griffin's boy.

When Penman came over to the Griffins, he did not bring with him many of his belongings—in other words,

he did not "move in." Indeed, Penman brought only a few articles of civilian clothing, on hangers, and kept nothing in drawers. During the ensuing two-week period while Penman was in Cincinnati, he neither looked for nor held a job, his main purpose for being in Cincinnati being to visit his relatives. Some of his meals, but not all of them, were taken with the Griffins, and he took care of his own laundry.

After spending two weeks in Cincinnati, Penman went back to Chicago, although he did not reinlist in the Navy at this time. Penman remained in Chicago, working on or near the naval base, until the latter part of September, 1965, at which time he returned to Cincinnati, arriving there on September 27, a Monday evening. Again when Penman arrived he went straight to his mother's house. Penman had left his trunk and his other belongings at his mother's (when he had gone back to Chicago), and they had remained there. Little had changed in the interim with respect to the housing situation, and so Penman again was invited to sleep at the Griffin's. And, as before, he brought with him to the Griffin home nothing more than some civilian clothes, and, this time, his Navy dress uniform. The day of Penman's arrival, September 27, 1965, was the first time Griffin had seen Penman since Penman had left Cincinnati in July.

From the time of his arrival on the 27th (Monday) until Friday night, October 1, Penman had borrowed Griffin's automobile once—on Thursday night—for the purpose of picking up some cigarettes. Penman brought the car right back at this time after about 10 or 15 minutes. On the evening of October 1 when Penman came over to the Griffin's (between 8:30 p.m. and 9:30 p.m.), he found Mr. and Mrs. Griffin at home with one Ann Berry, one of Mrs. Griffin's girl friends with whom she

worked during the week at Bathesda Hospital in Cincinnati. Penman had never met Ann Berry before.

At approximately 10:30 p.m., Penman asked Griffin whether he could borrow Griffin's car "to take Ann Berry home." Griffin agreed and told Penman that his car keys were on top of the dresser in his (Griffin's) bedroom. Penman went into the bedroom, obtained the keys, and left with Ann Berry. Nothing further was said by either party with respect to the use to which the car was to be put. Ann Berry's home was located in Cincinnati, Ohio, about one-half mile from the Griffin home.

Before taking Ann Berry home, Penman drove with her to the Q Lounge, a local club, and then took her to Frisch's Big Boy, an eating establishment, for something to eat. After taking her home, Penman did not return to the Griffin's, but went instead to his mother's home, getting there at about 1:00 a.m. He went inside and went to sleep on a couch, but awoke at about 4:00 a.m. He then announced to his sister, Jewel Green, who was awake at the time, that he was going to Chicago to reinlist.[1] She asked if she could go. He consented, and they both left for Chicago immediately. The accident occurred some four hours later in Benton County, Indiana.

II. *The Applicable Law*

Before reaching the merits, the court would make it abundantly clear that under the facts and circumstances of this case, the law of the State of Ohio, not Indiana, must govern the construction of the automobile liability

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[1] From the time of Penman's discharge from the Navy in July, Penman had a ninety-day period in which to reinlist. Thus, by the latter part of September, Penman's reinlistment period had not expired yet. Penman had reinlisted once before, in 1959, for a period of six years. Penman could reinlist at any Navy office, but by reinlisting at Chicago, Penman could receive his reinlistment bonus immediately.

insurance contract involved herein. The court is not here directly concerned with the circumstances of the underlying tort occurrence or of the law applicable thereto. See *Williamson* v. *Massachusetts Bonding & Insurance Company*, 19 Conn. Supp. 59, 109 A.2d 896 (C.P. 1954), aff'd, 142 Conn. 573, 116 A.2d 169 (1955). This court is concerned with the rights and obligations arising under and by virtue of the Griffin Automobile liability policy; and although to be sure, the tort plaintiffs (the defendants herein) have a vital interest in the outcome of the instant litigation, the inquiries into the properly applicable law are separable.

The insurance policy purchased by Sylvester Griffin was issued by the plaintiff insurance company and was delivered to the named insured in the State of Ohio. It was, in short, an Ohio contract. Griffin was at the time, and still is, an Ohio resident and domiciliary. The insured automobile was quite obviously intended to be used principally in the State of Ohio, thus localizing the principal situs of the risks covered by the insurance contract in the State of Ohio. See *Peterson* v. *Warren*, 31 Wis.2d 547, 143 N.W.2d 560 (1966). Additionally, and this is of some significance, the permission itself to use the automobile was granted by Griffin to Penman in the State of Ohio.

Generally speaking, absent a contrary intent manifested by the parties, or a contrary result compelled by statute, it has been held that the place where an insurance contract is "made," *Switzer* v. *Carroll*, 358 F.2d 424 (6th Cir. 1966 (Ohio law), or where it is written, issued, or delivered, see, e.g., *Roth* v. *Maryland Cas. Co.*, 209 F. 2d 371 (3d Cir. 1954) (Pa. law), *Moffat* v. *Metropolitan Casualty Company of New York*, 238 F. Supp. 165 (D.C.Pa. 1965) (Pa. law), governs the construction of contract terms and provisions and the rights and obligations arising thereunder. See also *Employers'*

Liability Assur. Corp. v. *Youghiogheny & Ohio Coal Co.*, 214 F. 2d 418 (8th Cir. 1954) (Ohio law); *Nelson* v. *Insurance Company of North America*, 264 F. Supp. 501 (D.C.N.J. 1967) (N.J. law); and *Eagle Fire Insurance Company of New York* v. *Haskins*, 240 F. Supp. 283 (D.C.La. 1965) (La. law). In *State Farm Mutual Automobile Insurance Company* v. *Automobile Underwriters, Inc.*, 371 F. 2d 999 (7th Cir. 1967), the Court of Appeals for the Seventh Circuit, applying Indiana conflicts law, stated, in a declaratory judgment action similar to the one at bar, that:

> "Since the insurance policy was written and issued . . . in Indiana, the law of Indiana is to be applied in its construction."

See also *Clark* v. *Travelers Indemnity Company*, 313 F. 2d 160 (7th Cir. 1960) (applying Indiana conflicts law) (Illinois law applied to construe omnibus clause of policy issued, etc., in Illinois. Accident was Indiana accident.); and *cf. Travelers Ins. Co.* v. *Eviston*, 110 Ind. App. 143, 37 N.E.2d 310 (1941). In the instant cause, the insurance contract itself offers no express guidance as to the parties' intent with respect to the question at hand, nor can this court find any other manifestation of intention with regard to this question.

Looking more closely at the actualities of the case at bar, it can be clearly seen that with the exception of the underlying tort occurrence, almost every single "contact" between the contracting parties was with the law of the State of Ohio. Under the circumstances of this case, it appears unquestionably that the state with the most significant relationship with the rights and liabilities arising under and by virtue of the insurance policy herein involved is the State of Ohio. *W. H. Barber Co.* v. *Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945). It must be presumed, therefore, that it was the intention of the

contracting parties to have Ohio law apply to the construction of the contract terms.

While the parties have not seriously contested the applicability of Ohio law to the construction of the liability policy before this court, defendant Simpson does, nevertheless, offer an alternative, unsupported reference to a "well recognized principle in conflicts of laws that an Ohio contract will not be enforced strictly in Indiana where its enforcement would violate the settled public policy of Indiana." As applied to this case, such a statement is not only factually unwarranted, but is entirely inapposite.

Although the direction and philosophy of the law in Indiana, at least as thus far interpreted by the federal courts, seems clearly to be one of extreme liberality in finding coverage under the standard omnibus clause,[2] this court is unable to draw from a conflicts rule such as that which is implicit in defendant's argument, namely, that an Indiana court can under no circumstance apply the law of another state where an Indiana resident has been injured and where application of the foreign law, as opposed to application of Indiana law, would prevent the injured person from recovering under a contract of insurance.

In the first place, although to be sure, the ultimate beneficiary of omnibus coverage is the public, *Auto Owners (Mutual) Insurance Company* v. *Stanley*, 262 F. Supp. 1 (D.C.Ind. 1967), likewise, a beneficiary is the permittee himself, the individual who is allowed to operate the insured automobile and who, absent such omnibus coverage, might be otherwise unprotected against a judgment recovered against him. In fact, it has been held that an omnibus clause, as such, is for the benefit

[2] This will be discussed briefly under Section III of this Memorandum of Decision.

of the permittee. *Arnold* v. *State Farm Mutual Automobile Ins. Co.*, 260 F. 2d 163 (7th Cir. 1958) (Indiana law). This broad omnibus coverage is not dictated by statute. Further, the only statutory provision which defendant could point to as even purporting to mandate any kind of minimum coverage under automobile liability insurance policies [3] requires only *part* of what is today in fact commonly included in the standard omnibus clause such as the one herein innvolved, and that part has been expressly held to apply to and protect only the owner-insured himself. *Spicklemeier* v. *T. H. Mastin & Co.*, 107 Ind. App. 350, 24 N.E.2d 797 (1940), approved in *Culley* v. *Farm Bureau Mut. Ins. Co. of Indiana, Inc.*, 224 Ind. 483, 69 N.E.2d 19 (1946).[4] Thus, not even the permittee himself is sought to be protected by Indiana legislation, let alone the person injured by negligent permittees. Compare, e.g., Wis. Stat. Ann. § 204.30 (3) (1957 Supp.).[5] Of course, the contractual omnibus clause does protect the permittee and, to the extent that it does, also benefits the public by enabling the injured party to recover damages. However, while this court is fully committed to the so-called "liberal" rule in extending this contractual omnibus coverage to situations involving, for example, deviations from intended use, defendant has

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[3] Burns Ind. Stat. § 39-4309 (1965 Repl.)

[4] In *Spicklemeier*, the court said:

> "It was not the purpose of this statute to provide that everybody who might drive the owner's car with his permission . . . should be insured against liability for negligence in its operation. . . . The mandatory provision of our statute, however, only requires that the owner of a motor vehicle who purchases such insurance shall be protected."

[5] "No policy shall be issued or delivered in this state . . . , unless it contains a provision reading substantially as follows: The indemnity provided by this policy [applies] . . . to any person or persons while . . . operating any automobile described in this policy. . . . [provided that the] use or operation . . . be with the permission of the assured named in the policy. . . ."

not shown this court a sufficiently compelling local interest, beyond the mere fact that Indiana appears to be evolving the law of permission along slightly different lines than Ohio, to justify overturning the overwhelming interest of the State of Ohio in the construction of the insurance contract provisions here in dispute. See *Clark* v. *Travelers Indemnity Company*, 313 F. 2d 160 (7th Cir. 1960).

Accordingly, this court is constrained to reach the result hereinafter indicated on the merits, based upon an application of Ohio law to the facts of this case. The court would, however, emphasize that there does appear to exist a fundamental difference, both in philosophy and degree, between the Ohio law of "permission" and the law in this regard of the State of Indiana.

III. *Coverage Under Policy Paragraph a.4 of "Insuring Agreement III": Whether Penman was a covered permittee under said provision.*

This paragraph of the Griffin insurance policy affords what is commonly known as "omnibus" coverage and provides, in pertinent part, as follows:

> "As used in Insuring Agreements I and V, the unqualified word "insured" means:
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> > . . . any person while using the automobile . . ., provided the actual use of the automobile is by or with the permission of a named insured. . . ."

Assuming, as we may properly do in this case, that it is undisputed that "initial permission"—that is, permission to take and operate the automobile in the first instance, without regard to possible deviation from intended use—was in fact given, it is incumbent upon this court to ascertain the law of Ohio with respect to the scope of such permission, once given. Generally, courts have tended to

pursue one of three modes of analysis, or "theories," in this regard. *First*, there is a so-called "strict" or "conversion" rule requiring that in order that the insured automobile be found to have been used with "permission" within the meaning of the policy term, it must be shown that the particular use being made of the automobile at the time and place of the accident involved was precisely the same use granted by or consented to by the named insured. *Second*, there is the opposite extreme of the "strict" rule, the so-called "liberal" rule which provides, in substance, that only "initial" permission to use the insured automobile is required. Under this mode of analysis, any deviation from intended use, whether slight or substantial, both temporally and geographically, is immaterial. *Third*, there is the so-called "minor deviation" rule which is in essence simply a middle ground between the extremes of the "strict" rule and the "liberal" rule. Courts adopting this mode of analysis must examine each case on its own facts to ascertain whether the deviation, if any, from intended use was slight or material, with coverage extended in the case of the former and denied in the case of the latter. See *Arnold* v. *State Farm Mutual Automobile Insurance Company*, 260 F. 2d 161 (7th Cir. 1958), adopting this classification proposed in an annotation found at 5 A.L.R.2d 600, at 622.

In *Gulla* v. *Reynolds*, 151 Ohio St. 147, 85 N.E.2d 116 (1949), a case involving a deviation from intended use by an employee who had asked for and received permission to use his employer's truck to deliver an item of furniture which he, the employee, had just purchased from his employer, the Supreme Court of Ohio, in affirming the lower courts, held specifically that there was no coverage under the omnibus clause of the insurance policy involved in that litigation. The Ohio Court of Appeals had held[6] that:

[6] 82 Ohio App. 243, 81 N.E. 2d 406 (1948).

> ". . . while no affirmative instructions against other use were given, yet all implications to be drawn from the circumstances tend toward limitation to make delivery but little more than one block away, as to distance, and return the truck directly and immediately to the parking lot as to time. Some three hours later and beyond the area necessary to the contemplated use and beyond the scope of the purpose for which the driver was in possession and outside the right of the user . . . this accident occurred." [7]

The Court of Appeals briefly reviewed some of the ways of construing permissive use provisions in liability insurance policies, devoting its analysis generally to two "doctrines": a so-called "minority rule," similar to what this court has previously referred to as the "liberal rule," and a so-called "majority doctrine," similar to what this court has previously referred to as the "minor deviation rule." The Court of Appeals refused to apply the initial permission ("liberal") rule advocated by the plaintiff and adopted instead its self-described "majority doctrine," to wit:

> ". . . [P]ermission by the owner to the use of his car by another *includes only such use as was reasonably contemplated by the owner*, as shown by the circumstances, and that while, even under this doctrine, a slight deviation would not necessarily exclude coverage, yet a *use by the operator outside the scope of the owner's contemplated permission excludes such use from being the permitted use within the terms of the policy.*" (Emphasis added.)

The Ohio court, in this regard, then fashioned a crucial distinction between omnibus clauses that refer only to

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[7] The court also referred to an Ohio statute making it a criminal offense to use a motor vehicle without the "consent" of the owner and indicated that the deviation involved in *Gulla* may have even constituted such offense.

"use" by the permittee and those which refer to "actual use," a distinction expressly rejected by some courts. See, e.g., *Arnold* v. *State Farm Mutual Automobile Insurance Company*, 260 F. 2d 161 (7th Cir. 1958). Describing the purpose of including the term "actual" within the omnibus clause as an attempt to escape the operation of the "minority rule" ["liberal" or "initial permission" rule], the court quoted from 7 Appleman, *Insurance* § 4354:

> "The term 'actual use', as employed in the present policy, was drafted to confine the coverage to situations where the employment made of the vehicle *at the time of the accident* was within the scope of the permission granted." (Emphasis added.)

Further, the court continued:

> "It seems logical to this court that the term 'actual use' be construed as referable to the *use* being made of the car *at the time and place of the accident* and if that be outside the reasonable scope of the permission granted to hold that coverage is not extended to the driver." (Emphasis added.)

The Supreme Court of Ohio affirmed, stating that:

> ". . . the departure in the instant case . . . was complete. . . . Reynolds borrowed the truck for his own errand of a few minutes to make a delivery of a bed a distance of a block and a half but still had the truck five hours later in a different part of the city on a wholly different mission.
>
> "The lower courts were correct in declining to follow the extreme, minority rule which obviously lends itself to gross abuse by an unscrupulous individual who, in violation of his express instructions, might retain possession of the automobile indefinitely and operate it over unlimited territory with the insurance still in effect. If such extreme unlimited coverage is to be afforded, it would seem that in fairness to all concerned it should be so stated in the policy."

This is, therefore, a clear pronouncement by the highest courts of Ohio that Ohio does not subscribe to the view that initial permission, once granted, constitutes "permission" within the meaning of an Ohio omnibus clause notwithstanding a substantial deviation from the original use intended by the owner-insured. On the contrary, each case must be examined to determine (1) the nature and extent of the original permission granted by the owner-insured and (2) the use being made of the insured vehicle at the time and place of the accident. Then, in view of all of the circumstances, the extent of any deviation must be ascertained.

The Ohio courts had, even before *Gulla* v. *Reynolds*, required that in order to come within the protection of an omnibus clause extending coverage to one using the insured automobile with the permission of the insured, the court must determine whether the *actual* use *at the time of the accident* was within the scope of permission granted. See *Kazdan* v. *Stein*, 26 Ohio App. 455, 160 N.E. 506 (1927), 118 Ohio St. 217, 160 N.E. 704 (1927); *Denny* v. *Royal Indemnity Co. of New York*, 26 Ohio App. 566, 159 N.E. 107 (1927); *Trzick* v. *United States Casualty Co.*, 52 Ohio App. 246, 3 N.E.2d 684 (1935). And cases subsequent to *Gulla* continue to make the same distinction. See, e.g., *Marolt* v. *Lisitz*, 94 Ohio App. 298, 115 N.E.2d 169 (1952).[8]

Courts in other jurisdictions have applied a similar rule. In *Employers Mutual Casualty Company* v. *Poe*, 191 So.2d 541 (Miss. 1966), the court, citing *Gulla* v. *Reynolds*, emphasized the importance of the words "actual use" as used in the omnibus clause, holding there that the particular deviation involved in the case before the court was "substantial," thereby excluding coverage. And

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[8] ". . . even where permission to use an automobile is granted by the insured, the *actual* use by the permittee must be within the terms of the original purpose for which the consent was given."

in *Hartford Accident & Indemnity Co.* v. *Peach*, 68 S.E. 2d 872 (Va. 1952), it was held that the word "actual" intended to refer to the "particular use at the time in question." Still other courts have adopted the so-called "minor deviation" rule without making the express reference to the use of the words "actual use" in the particular omnibus clause. See, e.g., *Fidelity & Casualty Co. of New York* v. *Harlow*, 59 S.E.2d 872 (Va. 1950) ("Permission to do a specific thing is not permission to do all things."); *Harrison* v. *Densmore*, 183 S.2d 787 (Ala. 1966); *Speidel* v. *Kellum*, 340 S.W.2d 200 (Mo. 1960); *Wallin* v. *Knudtson*, 278 P.2d 344 (Wash. 1955), and *Western Pacific Insurance Company* v. *Farmers Insurance Exchange*, 416 P.2d 468 (Wash. 1966).

Some courts have expressly rejected any analysis that places such reliance on the use of one word in the omnibus clause. In *Small* v. *Schunke*, 201 A.2d 56 (N.J. 1964), the New Jersey Supreme Court, which follows the so-called "liberal rule," simply construed the word "actual" to mean that permission had to be given for the automobile's actual use and operation, without regard to time, place, or purpose. And in *Protective Fire and Casualty Company* v. *Cornelius*, 125 N.W.2d 179 (Neb. 1963), the Supreme Court of Nebraska, a state which has a so-called omnibus statute, held that the presence of the word "use" (alone) in the statute superseded and overrode the words "actual use" as found in the policy's omnibus clause.[*] See also *McConnell* v. *Travelers Indemnity Company*, 180 So.2d 406 (La. 1965).

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[*] In this respect, the court must reject defendant's argument that Section 4509.51 of the Ohio Rev. Code mandates coverage in the present case. The dissenting judge in *Gulla* felt that Section 6298-7 of the General Code [now § 4509.01 et seq.] did, but the majority did not even devote any time to discuss the matter.

Defendants would have this court take the fact that there have allegedly been two subsequent revisions of the Code since *Gulla*, with the language of Section 4509.51 having not been changed, as

However, it is without question that for purposes of the case at bar, this court must confine itself to an analysis of whether, under the facts and circumstances surrounding the grant of permission by Sylvester Griffin to Thomas E. Penman, Jr., the use being made of the insured automobile by Mr. Penman on the morning of October 2, 1965 in Benton County, Indiana, was within the scope of the permission granted. The court is compelled to reach the conclusion that Penman's use of the automobile grossly exceeded any permission given him for the use of said automobile.

Obviously, the very nature of the analysis employed by the Ohio courts precludes the applicability of fixed or precise standards by which to judge whether the scope of permission has been substantially exceeded.[10] This determination can only proceed on a case-by-case basis, and, for guidance, this court must look to the Ohio decisions.

In *Gulla* v. *Reynolds*, the extent of the deviation was slight as compared to the facts of the case at bar, involving, to be sure, a use somewhat beyond the scope of that which was granted, but at a time no more than four hours after the original permission was granted and in the same city. In *Denny* v. *Royal Indemnity Co. of New York*, 26 Ohio App. 566, 159 N.E.107 (1927), an employee, charged with the responsibility of driving his employer's car to

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an indication that indeed the dissent in *Gulla* is today the law of Ohio. The court would rather think that the subsequent revisions without change indicate, *if anything*, a tacit acquiescence in the *Gulla majority* opinion, although doubtedlessly nothing at all could fairly be said to be inferable from the unchanged nature of Section 4509.51. The predecessor of this section was on the books when *Gulla* was decided, and even if we read this section of the Code into the instant policy, as may well be proper in this case, it would appear to have no effect on the construction to be given the omnibus clause herein involved.

[10] See the criticism in this regard of the "minor deviation rule" itself by Hastings, J., in *Arnold* v. *State Farm Mutual Automobile Insurance Company*, 260 F.2d 161 (7th Cir. 1958) (Indiana law).

the Post Office and back for the purpose of picking up the day's mail, deviated from said route in order to see his mother. The court refused to find that the employee was within the scope of the policy coverage. Likewise denied coverage was the employee in *Trzich* v. *United States Casualty Co.*, 52 Ohio App. 246, 3 N.E.2d 684 (1935), who, although having his employer's permission to drive the company truck to and from work and although he had been told not to use the truck for the purpose of "running around," nevertheless took the truck from Akron, Ohio, the situs of his employer's business and the employee's residence, to Youngstown, Ohio. However, see *Brown* v. *Kennedy*, 141 Ohio St. 457, 48 N.E.2d 857 (1943), wherein a second permittee was held to be covered inasmuch as he was operating the insured automobile in furtherance of the permittee's purposes. The court warned, nonetheless, that had the evidence disclosed that the second permittee was driving alone on some mission of his own, a different situation would be presented. Compare, *West* v. *McNamara*, 159 Ohio St. 187, 111 N.E. 2d 909 (1953).

Although the facts involved in *Denny*, with respect to the extent of the deviation, seem rather mild, the facts involved in the case at bar surely obviate the necessity of putting such a case as *Denny* up against it. Thomas Penman requested permission to use the Griffin automobile *for the purpose* of taking Ann Berry home, a distance of approximately one-half mile. It was 10:30 p.m. when the request was made and, inasmuch as Penman had used Griffin's car on one prior occasion (the night before) and had returned it promptly after completing his errand, and inasmuch as Griffin had to go to work the next morning and needed his car for that purpose,[11] there was no

[11] Griffin worked at a valve company Monday through Friday and required his car for transportation purposes. Griffin would also customarily take his wife by car to the bus stop every morning.

[Footnote continued on next page]

reason at all, under all the circumstances then existing, that Griffin should have either known or suspected that Penman was going to do something else with his car.

When Griffin awoke the next morning to find that his car was not in front of the house and that Penman was gone, he immediately went over to Penman's mother's house to inquire as to Penman's whereabouts. He was unable to find out where Penman was, although a little six-year old girl had earlier mentioned to Griffin that Penman might be on his way to Chicago. Griffin did not believe her. Griffin then walked his wife over to the bus stop, went to work at Mr. Wilson's, and from there telephoned the police to find out whether there had been any reported accidents involving a 1960 Oldsmobile. While Griffin did not report that his car had been stolen, no reason appears why he should have done this. And, although defendants argue strongly that his failure to report his car stolen is inconsistent with the plaintiff's present assertion that Penman was at that time of the accident operating the Griffin vehicle without Griffin's permission, defendants fail to realize that there are more than two polar alternatives—especially under the law of Ohio. An automobile may be operated without its owner's "permission" within the meaning of an omnibus clause and yet not be considered stolen.

Penman had actually never returned Griffin's car to the house, having taken it instead over to his mother's house (perhaps to pick up some of his things!) and, some three hours later, leaving directly from there destined for Chicago. Quite obviously then, it would have been highly unlikely for Griffin even to have missed his automobile until the morning when he awoke to get ready for work. Nothing which Griffin did, either before or after allowing Penman to use his car, could be deemed to have

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[13] [Continued]

On Saturdays, Griffin worked as a part-time caretaker for a Mr. Holden Wilson.

been an implied assent by Griffin to Penman's continued use of his car. See *Kazdan* v. *Stein*, 26 Ohio App. 455, 160 N.E. 506 (1927), aff'd, 118 Ohio St. 217, 160 N.E. 704 (1927); *Mazdra* v. *Selective Insurance Company*, 398 S.W.2d 841 (Mo. 1966); *Crenshaw* v. *Harleysville Mutual Insurance Company*, 144 S.E.2d 810 (S.C. 1965). Compare *Krebsbach* v. *Miller*, 125 N.W.2d 408 (Wis. 1963). The accident herein involved occurred approximately nine hours after original permission had been given and under circumstances wherein original permission would have appeared to have been requested and sought by Penman for a very short period of time—perhaps no longer than an hour or two. Yet the accident occurred in another state, approximately 150 miles distant from the city of Cincinnati, and while Penman was enroute, cross-country, to Chicago, Illinois. Ann Berry had long since been taken home. Likewise, the purpose for which the Griffin automobile was being used at the time of the accident was wholly and entirely different than the purpose for which the car had been given to Penman on the night of October 1.

In short, while many of the Ohio cases involving the issue of permission have concerned business permittee situations and hence should be properly observed in a slightly more restricted light than situations such as the case at bar, where the alleged permittee is a relative of the named insured, this consideration is one of degree, to be applied to the particular facts and circumstances of each case. The inquiry ultimately is the same, however: Did the driver-permittee *at the time of the accident* have the named insured's permission to operate the insured automobile? Under the facts of the case at bar, this court finds that Penman had substantially and materially deviated from the scope of the permission which had been granted to him. Accordingly, this court holds that under the law of Ohio Penman was not an "insured"

within the meaning of the omnibus clause of Griffin's insurance policy.

The court would refer to one additional matter with respect to the Ohio law of permission. Defendants attempt, rather obliquely, to show the court that *Gulla* v. *Reynolds* has somehow either been emasculated, or, *sub silentio*, overruled. They point to the case of *Costa* v. *Cox*, —— Ohio App. ——, 171 N.E.2d 529 (1958), aff'd, 168 Ohio St. 379, 155 N.E.2d 54 (1958), wherein Cox was involved in an automobile accident while driving an automobile belonging to his uncle, Howe, which automobile was insured by Buckeye Union Casualty Company. Buckeye denied liability under the uncle's policy, setting up defenses of lack of permission, failure to give timely notification, and failure to cooperate. Factually, the uncle had given permission to his nephew, Cox, to drive the Howe automobile on September 12 for the purpose of transporting Howe from his home in Barberton, Ohio, to his place of employment in Akron, Ohio, then to proceed to pick up Howe's wife in Akron and take her back to Barberton, and then to return to Akron at about 4:30 p.m. to pick up Howe at work. Cox delivered Howe to Akron at about 8:00 a.m. The normal driving time between Barberton and Akron was twenty-five minutes. At approximately 1:00 p.m., while driving the insured vehicle in Akron, Cox was involved in the accident as a result of which his liability arose.

These facts and the proceedings had thereon present no special problem. The trial judge, apparently being of the opinion that there was sufficient evidence in the record to justify submitting the issue of permission to the jury, did so, and the jury determined that (as stated by the court):

> ". . . Cox, *at the time of the accident*, was driving the car with the permission of the named insured. . . ." (Emphasis added.)

This reference to the issue of permission is the only reference to that issue contained in either the Court of Appeals or the Supreme Court opinion. The facts related by the Court of Appeals are at best sketchy, but readily indicate that the scope of permission granted by the insured owner was quite broad, contemplating highway driving between cities on at least three occasions during the same day. The accident took place on the very same day and in one of the two cities in which Cox could properly drive in carrying out his assignment. The only deviation appears to have been one of time, and whether the scope of permission contemplated such a deviation or whether the deviation was "slight" within the meaning of the Ohio law of permission was a question which was resolved, for the plaintiff (in favor of coverage), by the jury. One dissenting judge on the Supreme Court, writing at Page 58 of 155 N.E.2d, felt that *on the evidence* for the court to have allowed the question to go to the jury, it would have had "to disregard" *Gulla* v. *Reynolds.*

This, then, is the basis upon which defendants would have this court hold that the present-day law of Ohio would permit—indeed, would compel—a finding that permission existed in the present case. Nothing could be farther afield. In the first place, the present case is miles apart factually from *Costa.* Secondly, the very language used by the Court of Appeals in affirming the trial court's actions indicate that the court was indeed applying the *Gulla* v. *Reynolds* test of looking to the *time of the accident* and determining whether permission existed as of that time. See Page 533, 171 N.E. 2d. The facts and, hence, the outcome were simply different than the present case. And finally, even Judge Matthias, who dissented in *Gulla* v. *Reynolds,* at Page 122 of 85 N.E. 2d, and who was with the majority in *Costa,* dissented in *Gulla* not on the issue of permission, but, rather, on the grounds that to the extent of $5,000, Section

6298-7 of the Ohio General Code (a part of the Ohio financial responsibility law, corresponding to § 4509.01 et seq. of the Revised Code) compelled coverage. Defendants would indicate that Judge Matthias' switch from dissent in *Gulla* to majority in *Costa* heralds a change in the Ohio law of permission. This is simply not so, and a brief excerpt from Judge Matthias' dissent in *Gulla* will make this abundantly clear:

> "I am in accord with the conclusion of the majority that Reynolds was not, at the time of the accident, included within the definition of the word, 'insured,' as used in the omnibus clause of the policy. . . . Reynolds was driving the truck in disregard of the instructions of the owner, a gross violation of the original permission granted him. Such use was excluded from coverage by the requirement in the policy that 'the *actual* use of the automobile' must be 'with the permission of the named insured.'"

Defendant's contention that Ohio would today adopt the liberal rule with regard to the question of permissive use is without foundation and disregards the clearly stated law of that state.

The court at this time would reiterate, however, that this result is reached on an application of Ohio law to the particular facts of this case. This court need not now determine what the outcome of this case would be were the law of Indiana to have applied. However, the distinct differences between Indiana's developing case law on the subject of permissive use and the status of the Ohio law on that subject must be noted. In *Arnold* v. *State Farm Mutual Automobile Insurance Company*, 260 F. 2d 161 (7th Cir. 1958), the Court of Appeals for the Seventh Circuit, applying Indiana law, held, on the rationale of *American Employers' Ins. Co.* v. *Cornell*, 225 Ind. 559, 76 N.E.2d 562 (1948), and *Mercer Casualty Co. of Celina, Ohio* v. *Kreamer*, 105 Ind. App. 358, 11 N.E.2d 84 (1937), that:

> ". . . under Indiana law, one who has permission of an insured owner to use his automobile continues as such a permittee while the car remains in his possession, even though that use may later prove to be for a purpose not contemplated by the insured owner when he entrusted the automobile to the use of such permittee. This is to say that under such circumstances a *deviation in use from that intended by the insured owner will not operate to terminate such permission granted. . . .*" (Emphasis added.)

Arnold involved an employee who was entrusted with the use of his employer's truck in order to oversee the owner's two farms and who deviated from this purpose to go into a town some fifteen miles distant and purchase some illegal whiskey. Coverage was upheld in that case. Subsequently, although the court cautioned that "the rule in this case should not be extended unnecessarily beyond the boundaries of this case, since in other situations there may be factors which Indiana courts may find to terminate permission." This "liberal" rule announced in *Arnold* has been reiterated and applied numerous times by the federal courts applying Indiana law. See *Auto Owners (Mutual) Insurance Company* v. *Stanley*, 262 F. Supp. 1 (D.C.Ind. 1967) ("permission" found where minor secured the permission by means of misrepresentations, though limited to the facts of that case); *Home Mutual Insurance Company* v. *Automobile Underwriters, Inc.*, 261 F. Supp. 402 (D.C.Ind. 1966) (second permittee held covered); and see *State Farm Mutual Automobile Insurance Company* v. *Automobile Underwriters, Inc.*, 371 F. 2d 999 (7th Cir. 1967) (second permittee held covered), and *Riehl, et al.* v. *National Mutual Insurance Company*, 10 Ind. Dec. 49 (7th Cir. 1967) (vendee held covered).

This court would, of course, be bound to follow both the spirit and philosophy of the foregoing cases were the choice-of-law problem to have been resolved in favor of

application of the Indiana law of permission to the instant controversy. That not being the case, and while this court considers the Indiana law and federal cases applying Indiana law which have dealt with the question of permission to have laid down the better rule, this court is not free to disregard the clearly stated construction of the term by the courts of the state whose law must govern the present controversy.

IV. *Coverage under Paragraph b of "Insuring Agreement III": Whether Penman was a "Resident" of the Named Insured's Household.*

Any person who is deemed a "first-named insured" under Paragraph b of "Insuring Agreement III" is taken out of the group which must acquire and maintain the named insured's permission in order to be covered under the named insured's liability policy. Paragraph b defines "first-named insured" as follows:

> ". . . the individual first named in the declarations and while a resident of such individual's household, the spouse of such individual and any relative of either."

There is no question but that Thomas E. Penman, Jr., was a "relative" within the meaning of Paragraph b. He was Mrs. Griffin's brother and, by way of marriage, was Sylvester Griffin's brother-in-law. Rather, the problem is encountered with respect to Penman's status as a "resident" of the Griffin household at the time he took Griffin's automobile on the night of October 1, 1965.

The court has exhaustively researched this rather troublesome facet of the law and has read the briefs that have been submitted by the parties. Based on the evidence in the record of this case, and, within all reasonable limits, resolving every ambiguity and uncertainty which inheres in the term "resident" strictly against the in-

surer, and giving Penman every benefit of the doubt, this court is of the opinion that Thomas E. Penman, Jr., was not a "resident" of the Griffin "household" on the evening of October 1, 1965.

In *American Universal Insurance Company* v. *Thompson*, 384 P.2d 367 (Wash. 1963), the issue was whether an unemancipated son of the named insured was a "resident" of the named insured's household. The son was a minor, had left home to join the army, although he stored his belongings at his parents' home and came home on his furloughs. On the grounds that the son was only away from home temporarily and hadn't, in the meantime, established a residence anywhere else (an intervening marriage had been annulled), the court held that he was an additional insured under the automobile liability policy. Similarly, in *Detroit Automobile Inter-Insurance Exchange* v. *Feys*, 205 F. Supp. 42 (D.C.Calif. 1962), the court, applying Michigan law, found that a son who had joined the Navy but had returned home on his fifteen- and thirty-day furloughs was a "resident" of his father's home so as to be covered under the father's liability policy. And a thirty-two-year-old son who had left home upon his marriage, but who subsequently returned after he was divorced and had lost his job, and who continued to live with his parents while he was trying to locate other work, was held to be a "resident" of his father's household in *National Farmers Union Property & Casualty Co.* v. *Maca*, 132 N.W.2d 517 (Wis. 1965).

However, in *American Casualty Company of Reading, Pennsylvania* v. *Crook*, 197 F. Supp. 345 (D.C.W.Va. 1961), aff'd, 301 F. 2d 846 (4th Cir. 1962), the named insured's brother-in-law was found not to have been a "resident" of the named insured's household. Yet the brother-in-law had actually lived with the named insured for a number of months the year before, but left thereafter in order to live in Florida. But the next year he returned and had stayed with the named insured a period

of some four days when the accident occurred. Despite the fact that the brother-in-law had brought all of his personal belongings with him and participated in the social and family activities of the named insured, the court held that each period of the brother-in-law's stay must be viewed independently and that, all in all, he was not to be deemed a "resident" within the meaning of the policy. And in *State Farm Mutual Automobile Insurance Company* v. *Smith*, 142 S.E.2d 562 (Va. 1965), the named insured, who lived in California, left the state and went to visit her sister. She was pregnant and took her children with her to her sister's house intending to stay there until she had the baby. While living with her sister and while driving an automobile belonging to her sister, the named insured was involved in an accident. Her insurance policy gave her protection if she was operating a "non-owned" vehicle, but the same policy would have prevented the sister's automobile from being considered a "non-owned" automobile within the meaning of the policy if, in effect, the named insured was a "resident" of her sister's household. The court held that she was not a resident, but was, rather, a "visitor" or "sojourner." Similarly, in *Goens* v. *Arinder*, 161 So.2d 509 (Miss. 1964), a son-in-law was held not to have been a "resident" of his father-in-law's household, notwithstanding that he was actually living there with his wife and child while he was working on his own new house a short distance away from the father-in-law's house. His sister-in-law had driven his automobile and had an accident, but she would have been covered (as it turned out she was) under her own father's liability insurance policy insuring the use of "non-owned" vehicles. But, if the son-in-law would have been deemed a "resident" of the father's household, the son-in-law's automobile would not have been considered a "non-owned" automobile within the meaning of the policy.

A number of additional cases will suffice to present the proper background against which this court must

ultimately assess the meaning and legal effect of the term "resident [of the insured's] household" as used in the instant policy of liability insurance.

In *Jamestown Mutual Insurance Company* v. *Nationwide Mutual Insurance Company*, 146 S.E.2d 410 (N.C. 1966), plaintiff insurance company, the insurer of a dealer's automobile which was damaged by S's negligence while S was driving the car as a prospective purchaser thereof, sued the defendant insurer of S's father's automobile (which was not involved in the accident). The court held, in accordance with plaintiff's position, that S was covered under his father's policy of insurance inasmuch as S was a "resident" of his father's household and hence was covered for his operation of a nonowned automobile. Factually, S had, prior to the accident, left his parents' home, but had since returned and at the time of the accident was living at their home, was eating and sleeping there and having his laundry included in the family laundry, was using the facilities of the house at will, and was intending to remain there for an indefinite period of time. In contrast, a minor son, who had run away from home at the age of seventeen, who had later returned, but who then joined the Navy and came home only occasionally on leave, was found, in *Allen* v. *Maryland Casualty Company*, 259 F. Supp. 505 (D.C.Va. 1966) (Illinois law) (dictum), not to have been a "resident" of his father's household within the meaning of his father's liability insurance policy. But in *American Service Mutual Insurance Company* v. *Pugh*, 271 F.2d 174 (8th Cir. 1959) (Missouri law), a son who before going into service had lived with his parents and brother at home and who returned from the service on a forty-five-day furlough was found to have been a "resident" of his father's household.

The varying factual situations involved in the foregoing cases, and the apparent inconsistency in result which the holdings reveal, may be somewhat harmonized

by examining the consequence, in each case, of the court's determination of residency or non-residency. In *American Casualty Company of Reading, Pennsylvania* v. *Crook*, 197 F. Supp. 345 (D.C.W.Va. 1961), aff'd, 301 F.2d 846 (4th Cir. 1962), the individual who was liable as a result of the automobile accident was the named insured's son, the driver. The automobile being driven at the time belonged, however, to the named insured's brother-in-law. The named insured's automobile liability policy covered non-owned automobiles being driven by the named insured's son, but the problem was in the fact that the policy definition of a "non-owned" automobile would not cover an automobile owned by a relative of the named-insured if that relative was a "resident" of the named insured's household. Thus the problem. By finding that the brother-in-law was a "resident," insurance coverage would be denied, and a finding that he was not a "resident" would result in policy coverage. The court, in finding that the brother-in-law was not a "resident" of the named insured's household, was, in effect ruling in favor of insurance coverage. Similar results were consequent on the determinations of non-residency in *State Farm Mutual Automobile Insurance Company* v. *Smith*, 142 S.E.2d 562 (Va. 1965), and in *Goens* v. *Arinder*, 161 S.2d 509 (Miss. 1964). Looking at the consequences of the court's determinations of residency, however, in *American Universal Insurance Company* v. *Thompson*, 384 P.2d 367 (Wash. 1963), *Detroit Automobile Inter-Insurance Exchange* v. *Feys*, 205 F. Supp. 42 (D.C.Calif. 1962), and in *National Farmers Union Property & Casualty Co.* v. *Maco*, 132 N.W.2d 517 (Wis. 1965), it is evident that the result in each case was again to find insurance coverage under the circumstances. These six cases, therefore, all of them discussed previously in this memorandum, are uniform in this limited respect. There are exceptions, of course, to wit: *Allen* v. *Maryland Casualty Company*, 259 F. Supp. 505 (D.C.Va. 1966) (Illinois law) (dictum), also previously discussed, and

e.g., *Johnson* v. *State Farm Mutual Automobile Liability Insurance Company*, 252 F.2d 158 (8th Cir. 1958) (Missouri law), and *Perry* v. *Southern Farm Bureau Casualty Ins. Co.*, 170 So.2d 628 (Miss. 1965), but, in general, it is quite apparent that there is a general tendency for a court to give the ambiguous and uncertain term "resident" a broad construction where the court is faced with an issue of inclusion within a policy's coverage, and a narrow construction where the court is faced with an issue of exclusion from a policy's coverage. See, e.g., *Cal.-Farm Insurance Co.* v. *Boisserane*, 312 P. 2d 401 (Cal. App. 1957). This court subscribes to that viewpoint.

However, it is a far cry from giving a policy term a "broad" construction, in favor of insurance coverage, to completely ignoring the term. Stated another way, defendants would have this court find that because the policy term "resident" is ambiguous and uncertain or, at the least, is imprecise, ergo there is coverage under the Griffin insurance policy. There is no such rule of construction.

There is no denying that the term "resident"—used variously, with nuances of meaning; depending, for example upon whether the term is used in context of a venue controversy or one that involves incidents of taxation, voting, or divorce—is fraught with ambiguity and uncertainty, that is, as a term of general application.

Where language which is used in an insurance contract is ambiguous or lacks certainty, it should be construed liberally in favor of the insured. *Peterson* v. *Nationwide Mutual Ins. Co.*, 175 Ohio St. 551, 197 N.E.2d 500 (1964); *Butche* v. *Ohio Casualty Ins. Co.*, 174 Ohio St. 144, 187 N.E. 2d 20 (1962); *Munchick* v. *Fidelity & Casualty Co. of New York*, 2 Ohio St.2d 303, 209 N.E. 2d 167 (1965). With this broad and general proposition this court is in full accord. Strictly speaking, of course,

for purposes of the present litigation, a liberal construction would actually be in favor of insurance *coverage* rather than the "insured," for to assume that Thomas E. Penman, Jr., is the "insured" is to improperly assume that which it is the very purpose of this lawsuit to determine; and to view Sylvester Griffin as the "insured" is of no help inasmuch as Griffin himself had little, if any, personal interest in the outcome of this litigation. See *West* v. *McNamara*, 159 Ohio St. 187, 111 N.E.2d 909 (1953); *Cook* v. *Kozell*, 176 Ohio St. 332, 199 N.E.2d 566 (1964). Thus, while ambiguities and uncertainties inherent in the term "resident" and in the phrase "resident of [the named insured's] household" will be resolved in favor of insurance coverage, implicit in this rule of construction is a *choice* between alternatives. Accordingly, as between two or more *plausible* interpretations. *Rhodenbaugh* v. *Preferred Acc. Ins. Co. of New York*, 67 F. Supp. 379 (D.C. Ohio 1946), aff'd, 160 F. 2d 832 (6th Cir. 1946), or, stated another way, where an ambiguous or uncertain contract term or phrase requires construction or interpretation because of its being *fairly susceptible* of several different but *sensible and reasonable* readings, *Chavers* v. *St. Paul Fire & Marine Insurance Company*, 295 F. 2d 812 (6th Cir. 1961); *Copelin-Mohn, Inc.* v. *Buckeye Union Casualty Co.*, 135 Ohio St. 287, 20 N.E.2d 713 (1939); *Kitt* v. *Home Indemnity Co.*, 153 Ohio St. 505, 92 N.E.2d 685 (1950), that construction or interpretation will be employed which will favor insurance coverage. It should be noted that this does not say that where there is an ambiguity the court *will find* coverage! Rather, it is to say that the court must first determine that there *is* a construction or an interpretation which under the circumstances of the particular case could *reasonably* be found to apply so as to bring the facts within the policy's coverage, and only then will the court tend to favor or adopt such alternative. This is the very point involved

in the court's disposition of this particular aspect of this lawsuit—namely, that on the basis of the evidence before this court and the conclusions of law with respect to the very *minimum* which the term "resident" may be fairly said to import, this court cannot say that, on *any* reasonable or sensible construction of the term, Thomas E. Penman, Jr., was, on the evening of October 1, 1965, a "resident" of Sylvester Griffin's household. This court cannot rewrite the insurance policy involved in this litigation, *Trimble* v. *Western & Southern Life Ins. Co.*, 83 Ohio App. 102, 82 N.E.2d 548 (1948), which is what the court would in effect be doing were this court to transcend the applicable canons of construction and adopt the conclusions advocated by the defendants.

The term "resident" and the phrase "resident of [the named insured's] household" does not appear to be defined within the body of the insurance policy. Accordingly, this court should give to these words their usual and natural meanings in the particular context in which they are used. *Garlick* v. *McFarland*, 159 Ohio St. 539, 113 N.E.2d 92 (1953); *Yeager* v. *Pacific Mutual Life Ins. Co.*, 166 Ohio St. 71, 139 N.E.2d 48 (1957); *Brescoll* v. *Nationwide Mutual Insurance Co.*, 116 Ohio App. 537, 189 N.E. 173 (1961).

Black's Law Dictionary (4th ed.) defines "residence" succinctly as a "factual place of abode." Webster's Third New International Dictionary places similar emphasis on the aspect of having a settled place of abode or dwelling. Neither definition would require the aspect of permanence, but it is submitted, both definitions and practically the entire case law on the subject require something *more than raw physical presence*, however transient or unsettled. *Cf. Routt* v. *Barrett*, 71 N.E.2d 660 (Ill. 1947).

In *Hardware Mutual Casualty Company* v. *Home Indemnity Company*, 50 Cal. Rptr. 508 (Cal. App. 1966), the court stated that:

> "[It is] not necessary in order to be a resident of the same household . . . to have to be living there as a permanent family member. . . . [*A*] *resident* [*is one other than*] *a temporary or transient visitor*, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently." (Emphasis added.)

And in *National Farmers Union Property & Casualty Co.* v. *Maca*, 132 N.W.2d 517 (Wis. 1965), the court, per Fairchild, J., discussed the meaning of the term "resident" at some length in a case involving inclusion within policy coverage on a determination of residency, and said:

> "The expressions, 'resident of household,' 'member of family,' and the like appear (as in this case) in provisions excluding from coverage liability for such injuries to persons standing in such relationship to the named insured. The purpose has been explained as 'to exempt insurer from liability to those persons to whom insured, on account of close family ties, would be apt to be partial in case of injury'. . . . [Such expressions] appear in automobile liability policies in so-called 'drive-other-car' provisions, excluding liability arising out of the use of other automobiles owned, hired, or regularly used by a member of the insured's household. The purpose is to avoid coverage of several vehicles owned by members of the same family, who, by their close intimacy, might be expected to use each other's cars without hindrance and with or without permission. Such expressions appear, as in this case, in definitions of additional insureds. The purpose is *to provide protection for those whom, because of close relationship, a person obtaining a liability policy would ordinarily want it to protect.*
>
> "Although the purposes differ, *these expressions are used in all cases to describe a common type of*

> *close relationship*, varying greatly in detail, *where people live together in a closely-knit group*, usually because of close relationship by blood, marriage or adoption and deal with each other intimately [and] informally. . . .
>
> *"We think that one is not a resident of the household . . . if, even though he has no other place of abode, he comes under the family roof for a definite short period or for an indefinite period under such circumstances that an early termination is highly probable."* (Emphasis added.)

In *State Farm Mutual Automobile Insurance Company* v. *Walker*, 334 S.W.2d 462 (Tex. Civ. App. 1960), a case in which a girl, an insured owner of an automobile, was found not to have been a "resident" of the household of a family with whom she *roomed and boarded*, the court said:

> "[U]nder general rules of construction . . . there should be a fair and reasonable construction of the language of the policy, rather than a strained, unnatural, or technical interpretation. . . .
>
> "A rather unreasonable and ridiculous result would flow from any attempt to ascribe to the term . . . 'resident' a meaning which would embrace any and all persons who sleep within and take meals at [the building or structure which houses the insured and his 'household]. . . ."

Finally, the court, in *Goens* v. *Arinder*, 161 So.2d 509 (Miss. 1964), holding that the named insured's son-in-law was not a "resident" of his household, stated:

> "The word 'resident' means one having more than physical presence. The *transient visit of a person for a time to a place does not make him or her a resident while there.* The word . . . imports a fixed abode for the time being, as distinguished from a

place of temporary abode or a temporary sojourn." (Emphasis added.)

In *Goens*, the son-in-law and his family were in the process of constructing a house near in location to the named insured's home, and they were invited to come and stay with the named insured so that the son-in-law wouldn't have to travel so far back and forth and so that the named insured's daughter (the son-in-law's wife), who was pregnant at the time, could be better taken care of and more comfortable in the interim.

It appears, therefore, on an exhaustive survey of the cases involving a construction of the term "resident" and of the phrase "resident of [the named insured's] household," that, even assuming the most liberal, flexible, and broad interpretation of the term and phrase, it does mean something other than mere presence, and the words used cannot be simply disregarded. *Barnes* v. *Great American Indemnity Co.*, 60 Ohio App. 114, 19 N.E.2d 903 (1938). The court would note, not by way of limitation, but by way of observation only, that in almost every litigated case in this area, and certainly in almost every case cited by the parties in their briefs, a close blood relationship existed between the individual whose status was in controversy and the family comprising the "household" and was almost exclusively one of parent-child. But much more fundamentally, every single case in which there was a determination that the individual was a "resident" of a particular household involved a previous or a present pattern of living together as a family unit or at least living together under circumstances such that there existed an interrelationship which, for lack of a better term, we may call "familial integration." In other words, while this court recognizes that a nonrelative, or a distant relative, or a close relative not ordinarily thought of as forming part of the family group or unit can, under

appropriate circumstances, be deemed to be a "resident" of the named insured's "household" within the meaning of those terms as used in the instant automobile insurance policy, that individual must be living or dwelling together with the named insured (and the other members of his household) as part of a family unit. As it were, they must form part of a domestic circle. See *State Farm Mutual Automobile Insurance Company* v. *Walker*, 334 S.W.2d 462 (Tex. Civ. App. 1960).

In importing a bare minimum of meaning to the term "resident" as used in the phrase "resident of [the named insured's] household" this court cannot ignore the purpose and effect of this very phrase in the ordinary automobile liability insurance policy and, in particular, the policy involved in this litigation. A clause similar, although not identical, to the one herein at issue has been described as having been designed, in part, to replace the old-style omnibus clause with its "use other cars" concomitant and to have as one of its features

> ". . . coverage for use of an owned automobile by any resident of the named insured's household, *regardless of permission.* The 1955 standard provisions [Standard Family Automobile Policy] accomplished that purpose so far as the resident spouse was concerned. The family automobile policy extends that coverage to use by *anyone residing in the household.* The result is that all of the cases which have litigated questions of permission for use by Junior or other relatives or servants residing in the household have become obsolete. . . . There is now coverage for use by all of such persons whether or not the use of the owned automobile is *in fact with* the *permission* of anyone *and even if the use is prohibited.*" (Emphasis added.)

Risjord and Austin, "Standard Family Automobile Policy," Insurance Law Journal, No. 411, April, 1957,

p. 199. These comments are apropos of the clause involved in the instant case, for although it does not purport to cover *any* "resident" and is restricted to a "resident" who is also a "relative," the *effect* of this provision is to extend insurance protection, once the qualifications for coming within the scope are met, literally without limitation. The very words of the policy make this clear. The named insured whose insurance policy is involved would, under such circumstances, have absolutely no control over choosing the persons who could operate his automobile and enjoy the benefits of his own insurance protection. Accordingly, common sense would indicate that the requirement of residence contemplates and rests on an assumption that, as between the individual and the named insured's "household," there is something akin to a feeling and relationship of mutual concern, interest, and affinity such as exists, or normally exists, between members of the same family or household. After all, the main target of this clause was Junior who, perhaps contrary to an express prohibition against use by his parents, nevertheless violated his instructions and had an accident. Indeed the very presence in the same clause in which the term "resident" is used of the term "household" would indicate that the requirement refers to a *relationship* rather than to an impersonal physical fact of being in the same house. See, e.g., *State Farm Mutual Automobile Insurance Company* v. *Smith*, 142 S.E.2d 562 (Va. 1965), and *State Farm Mutual Automobile Insurance Company* v. *Walker*, 334 S.W.2d 462 (Tex. Civ. App. 1960).

A quick review of the facts involved in the case at bar, although previously discussed at greater length, will suffice to underline that on the most liberal interpretation, Thomas E. Penman, Jr., although Sylvester Griffin's brother-in-law, was on the evening of Ocotber 1, 1965 nothing more than a relative (by marriage) who, on two

different occasions spanning a period of about three months and for an aggregate maximum of about eighteen days, spent his nights at the home of the named-insured and that he was most assuredly not a "resident" in any reasonable sense of the word.

Thomas E. Penman, Jr., was not a "member" of the Sylvester Griffin family. He was not a charge of the Sylvester Griffin family. He was an adult and had completed ten full years of service in the United States Navy before spending his first night at the Griffin home. His point of reference, or center of activity, if any he had in Cincinnati, was his mother's house, not the Griffin's, for it was to his mother's house that he went directly upon arriving in town both in July and again in September, and it was at his mother's house that he kept and stored almost all of his personal things. Indeed if Penman was a "resident" of any household in July and September, he was a resident of his mother's household, for residence need not always be accompanied by physical presence. See, e.g., *Taylor* v. *State Farm Mutual Ins. Co.*, 171 So.2d 816 (La. App. 1965), aff'd, 178 So.2d 238 (1966) (son held to be resident of father's household although he was living with his uncle), and *American Casualty Co.* v. *Harleysville Ins.*, 208 A.2d 597 (Md. 1965) (wife held to be resident of husbands' household although she slept away at night), both cited by defendants. Penman was invited to sleep at the Griffin's house because sleeping conditions were crowded at his mother's. He ate some, but not all, of his meals at the Griffin's. His laundry was his own responsibility. Moreover, Penman's total "stay" at the Griffin's was about fourteen days in the month of July and then, after a gap of about two months, another four days (preceding the October 2 accident) in September. The record is absolutely devoid of any evidence that Penman intended to stay at the Griffin's home for any appreciable length of

time, nor is there even any indication that he intended to remain in Cincinnati. In fact, his returning to Chicago after two weeks, in July, and his returning again to Chicago after four days, in September, belies any intention to remain in Cincinnati. Furthermore, Penman's announced purpose in coming to Cincinnati was simply to "visit my people." He neither sought nor found employment in Cincinnati. Beyond what is indicated above, defendants have shown no other evidence, nor is there any in the record, that would indicate any other relationship, coexistence, or common ties between Penman and the Griffins or that Penman was any part of the Griffin "domestic circle." They were friends, to be sure, but for purposes of the Griffin insurance policy and, specifically, Paragraph b of "Insuring Agreement III," Penman was a mere casual visitor or guest, not a "resident."

Accordingly, this court holds that Thomas E. Penman, Jr., was not a "first-named insured" within the meaning of that term as contained in the insurance contract herein involved.

This memorandum contains the court's findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure.

JUDGMENT

It is therefore considered, ordered, adjudged, and declared:

That, on the morning of October 2, 1965, at the time and place of the automobile-truck collision involving Thomas E. Penman, Jr., driving the insured automobile, and Raymond K. Simpson, deceased, Thomas E. Penman, Jr., was not an "insured" under plaintiff Motorists Mutual Insurance Company automobile liability insurance policy, number 1.350106F10;

That Thomas E. Penman, Jr., was not using the insured automobile with the "permission" of the named insured or anyone authorized to grant such permission within the meaning of "Insuring Agreement III," Paragraph a.4 of said insurance policy; and

That Thomas E. Penman, Jr., was not a "first-named insured" within the meaning of "Insuring Agreement III," Paragraph b of said insurance policy.

Entered this 21st day of August, 1967.

_____

United States District Judge.

APPENDIX E

RESPONDENTS' TRIAL EXHIBIT 9

REVIEW FOR TRIAL

COURT—U.S. District Ct., Northern District Lafayette Division, Indiana.

CASE NO.—332

ANSWER DAY—November 23, 1965

FILE NO.—728451

INSURED—Sylvester Griffin

ADDRESS—860 Glenwood Ave., Cincinnati Ohio.

DATE OF ACCIDENT—October 2, 1965 7:50 A.M.

PLACE—U.S. #52, near Tolen Rd., Templeton, Indiana.

COVERAGE QUESTION—See remarks.

WEATHER—Clear and dry.

PLAINTIFF

NAME—Raymond K. Simpson

AGE—37

ADDRESS—3222 N. Temple, Indpls., Indiana.

OCCUPATION—Truck driver.

STATUS—Driver of adverse vehicle. Married.

BACKGROUND—He leaves a wife and 3 children.

COUNSEL—Townsend and Townsend

DEFENDANT

NAME—Sylvester Griffin

AGE—32

ADDRESS—860 Glenwood Ave., Cincinnati, Ohio

OCCUPATION—Unknown.

BACKGROUND—Nothing unusual developed.

CO-DEFENDANT—Thomas Penman, 29, driver of the vehicle.

PERSONAL COUNSEL—None indicated.

INJURIES ALLEGED—Fractured skull and brain hemorrhage resulting in his death October 3, 1965.

ATTENDING PHYSICIAN—Unknown.

EXAMINING PHYSICIAN—None.

DAMAGES—All unknown.

DEMAND—No demand made.

OFFERED—Case denied.

IS THIS A CASE OF LIABILITY? As to the defendant, no. As to the co-defendant, yes. Co-defendant lost control when the road narrowed causing his vehicle to go left of center, head on into the adverse vehicle.

POLICE INVESTIGATION—Co-defendant charged with reckless operation.

WITNESSES—None other than the occupants of the vehicles.

INVESTIGATED BY—Merle Robinson and Cincinnati Office

INVESTIGATION COMPLETE? Yes.

REMARKS—This case has been turned down on the matter of coverage. The co-defendant is a brother in law of the policyholder and had been released from the Navy after a 10 year enlistment. He is married with a wife and children in California. He had been at the defendant's home approximately one week and during that week had used the defendant's car once to buy cigarettes. On the night in question he asked the defendant for permission to use his car to take his girl friend home and that permission was granted. The co-defendant took his girl to an eating place and dropped her off at her home at 1:30 A.M. The co-defendant then decided to re-enlist and went to his mother's home and talked with his sister, Jewel Williams, about going to Chicago with him for the purpose of re-enlistment and obtaining his bonus check. The co-defendant states he had a few hours of sleep prior to the accident. The defendant's statement is to the effect that he would not have given his brother in law permission to drive to Chicago had that permission been asked for and he is being recontacted by the Cincinnati Office to determine whether or not he will maintain that position now that suit has been filed. The co-defendant was contacted in the hospital and his statement obtained due to the effect that he did not have permission to drive to Chicago but the statement was taken without clearance from the hospital authorities to the effect that the co-defendant was not under the influence of any drugs or sedatives. The co-defendant has returned to California and may have already re-enlisted in the Navy. We will therefore provide defense for the defendant but not the co-defendant.

/s/ Alton I. Williams
Alton I. Williams

/mh

November 10, 1965

SUPREME COURT, U. S.
SEP 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-130

MOTORISTS MUTUAL INSURANCE COMPANY, *Petitioner,*
v.
TERESA SIMPSON, Administratrix of the Estate of Raymond K. Simpson, deceased, and RANIA SIMPSON, GARY SIMPSON, and JO ANN SIMPSON, by their next friend, Frances Benoit, *Respondents.*

RESPONDENT SIMPSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT SIMPSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

It should take little time to deny this Petition for Certiorari. The "Rule of Two" calls for peremptory denial whenever the findings of the District Court have been *affirmed* by the Court of Appeals. That rule applies in this case, and it has been called "a seasoned and wise rule of this Court" on many occasions and without deviation.

The Rule of Two is buttressed in this case by the decision of an unanimous Court of Appeals, a decision in which one judge took the time to write a concise and brilliant concurring opinion (page 9a of Appendix to Petition).

The Rule of Two is buttressed by denial of a rehearing (page 13a of Appendix to Petition).

The Rule of Two is solidified by denial of an *en banc* hearing where "no judge in regular active service" on the Court of Appeals even requested "that a vote be taken on the suggestion for an *en banc* rehearing". (Page 15a of Appendix to Petition)

Furthermore, Petitioner has failed to comply with the Supreme Court Rules governing certiorari in the following:

1. The Petition for Certiorari fails to obey Rule 23(a) and (i) in that there is *not* appended to the petition a copy of "any opinions delivered upon the rendering of the judgment . . . sought to be reviewed, including *all* opinions . . . in the case". The *final opinion* of the Court of Appeals is referred to at page 1 of the Petition for Certiorari by citation at 494 F.2d 850 but is not appended. Surely this is not a compliance with the mandatory Rule 23(a) and 23(i) and failure to append a copy of the final opinion must at once be sufficient ground for peremptory denial of the Petition because Rule 23(4) provides:

> "The failure of a petitioner to present with accuracy . . . whatever is essential to a ready and accurate understanding of the points requiring consideration *will be a sufficient reason for denying his petition.*"

OPINIONS BELOW

Motorists fails to attach to its Petition a copy of the *official* opinion of the Court of Appeals. Instead, Motorists attaches as its Appendix A the slip opinion in an effort to exploit an ambiguity which was removed by the Court of Appeals before publication of its official opinion. Certiorari cannot be granted to an opinion which is not the official opinion and Motorists failed to set it out in its Petition. The "Memorandum of Opinion and Judgment of the District Court for the Northern District of Indiana" also may not be considered as an "Opinion Below." It is a piece of void philosophy by a District Judge in an abortive piece of litigation instituted by Motorists and nullified by the Seventh Circuit before the case at bar was ever filed. Comparisons of the record in that case with the record in this case reveal clearly that many different facts were involved in the case at bar, contrary to Motorists' assertion on page 2 of its Petition.

JURISDICTION

Simpson agrees that this Court has jurisdiction under 28 U.S.C. 1254(1) to determine whether Motorists has advanced any valid grounds for granting of a writ of certiorari.

QUESTIONS PRESENTED

Simpson contends that Motorists' statement of the "Question Presented" fails to present any ground for certiorari under 1254(1) or Rule 19.

Motorists' description of "circumstances", divided into three numbered paragraphs, are all defectively argumentative. They misstate the record as to what occurred at trial, pervert the actual findings of the

jury and of the Court of Appeals and recite as facts matters of evidence consistently rejected by the jury, the trial court and the Court of Appeals.

This action was initiated by filing a complaint in two Counts. Count I alleged that Penman was an insured under the terms of Motorists' policy and demanded judgment against Motorists for the $10,000.00 coverage plus interest on the entire tort judgment.[1] Count II charged Motorists with bad faith and demanded the balance of the tort judgment, $200,000.00. The jury returned a verdict for Simpson on both Counts, awarding $69,386.84 on Count I and $200,000.00 on Count II.

Motorists obscures the fact that judgment was rendered on two separate counts. Since Motorists' statement of "circumstances" omits reference to the issues presented under Count I, no contention has been presented for certiorari on the coverage issue and the Supreme Court must realize that Motorists has accepted the fact that Penman was indeed its insured and, therefore, entitled to the benefits of insurance coverage and to the judgment on Count I.

Furthermore, Motorists never asks this Court to reverse the lower court's decision on Count II alone, the bad faith issue, but blithely asks for reversal of the entire $270,000.00 judgment. (The judgment was actually in the amount of $269,386.84). Since Motorists has not challenged any of the matters relating to Count I, it would not be possible for this

[1] The policy clearly provides, and Motorists dare not dispute, that the basic policy coverage required it to pay interest on the *entire judgment* rather than merely on that portion of the judgment covered by the policy limitations.

Court to grant the relief Motorists apparently seeks through the matters raised in its Petition. Because Motorists fails to seek an appropriate remedy, this Court should conclude that there is no question presented for review.

STATEMENT OF THE CASE

Motorists' statement of the case constitutes a substantial departure from universally accepted rules of appellate practice. Under the guise of providing this Court with a factual background of the case, Motorists puts forth its own characterizations of the evidence, characterizations long ago rejected by the jury, the trial judge and the judges of the Seventh Circuit. It is axiomatic to Supreme Court certiorari procedure that when factual findings of the two courts below are the same, then the Supreme Court will not search the record to find or consider conflicting evidence. *Neil* v. *Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *Blau* v. *Lehman,* 368 U.S. 403, 408-409; 7 L.Ed. 2d 403, 82 S.Ct. 451, (1962); *Faulkner* v. *Gibbs,* 338 U.S. 267, 268, 94 L.Ed. 62, 70 S.Ct. 25 (1949). The facts supporting the jury's verdict on the coverage issue and the bad faith issue are clearly set forth in the Court of Appeals' opinion. Since Motorists does not challenge the sufficiency of the evidence to support the jury's verdict, repetition of these findings in the body of this brief is unnecessary. There were numerous other bad faith facts in the record not specifically noted by the Court of Appeals.

Motorists craftily blends the bulk of its arguments into its "Statement of the Case", rather than separating its arguments into clearly delineated sections. It is difficult to determine when Motorists is making

an argument purporting to show grounds for granting of this Petition or when petitioner is merely complaining about factual and legal rulings that were adverse in the Court below.[2]

Simpson will answer Motorists' three areas of complaint under separate headings.

ARGUMENT

EXCLUSION FROM EVIDENCE OF JUDGE ESCHBACH'S OPINION PROPERLY SUSTAINED AND NOT VIOLATIVE OF MINIMUM FEDERAL STANDARDS OF JUDICIAL PROCEEDINGS

Simpson filed the tort case October 25, 1965. Pre-trial conference was held June 16, 1966, and was then set for trial for December 30, 1966. Motorists had completed its investigation of the tort occurrence and had made its wrongful determination to deny coverage within a few weeks after the accident, so that it peremptorily rejected Simpson's settlement demand of December 23, 1965, the day it was received, and before Penman could have been consulted or even notified. Yet Motorists delayed initiating its declaratory judgment action until July 22, 1966, several weeks after the

---

[2] Simpson was forced to try this case to a jury without the benefit of live witnesses. Motorists, which had produced Griffin and Penman at the tort trial, the declaratory judgment trial and several depositions, left these witnesses in Ohio this time. Though Simpson put before the jury considerable correspondence between Motorists and its counsel, as well as claims and investigation materials, Motorists only brought one representative to the trial (Alton Williams), and he did not testify even though he compiled some of the important evidentiary documents and apparently participated in the decision-making processes leading to the bad faith refusal to settle. Let Motorists not be heard to complain about the dearth of live testimony, since all persons who might have testified live were either petitioner's own employees or persons previously brought to Indiana from Ohio by Motorists.

tort case had been pre-tried and assigned for trial. And even then Motorists chose an improper forum and never attempted to make Penman, whose rights were primarily at issue, a party to the declaratory judgment action. Judge Eschbach properly refused to allow such a dilatory maneuver to delay Raymond Simpson's widow and children their day in court.

Unfortunately, Judge Eschbach erroneously took jurisdiction of the declaratory judgment action and then wrote a 53 page opinion erroneously concluding Penman was not an insured. Simpson appealed to the Seventh Circuit on both the jurisdictional and substantive issues. The Seventh Circuit did not need to reverse Judge Eschbach on the erroneously decided substantive issues of coverage since it ordered the case dismissed for lack of jurisdiction, thus rendering his opinion a nullity.

Motorists' assertion that it would not be subject to this judgment if the Seventh Circuit had not reversed Judge Eschbach on the jurisdiction issue is palpably erroneous. The Seventh Circuit found it unnecessary to reverse Judge Eschbach on his erroneous substantive findings. But in light of the Seventh Circuit's unanimous affirmance of Count I herein, as initially decided in Simpson's favor by a jury and experienced trial judge, Simpson is confident that Judge Eschbach would have been reversed on the substantive issues even if his court had had jurisdiction, and Motorists would be facing the consequences of its tortious conduct just as it is now.

Judge Noland properly excluded from evidence the erroneous 53 page "Memorandum of Decision and Judgment" rendered by the Northern District in the declaratory judgment case. There should be no con-

fusion that Motorists in any way *relied* upon Judge Eschbach's opinion when Motorists engaged in its tortious conduct leading to the jury's verdict on Count II. The declaratory judgment case was tried in June of 1967, six months after the tort judgment against Penman had been rendered and eighteen months after Motorists had summarily rejected Simpson's settlement demand without consulting Penman.

Judge Eschbach's lengthy opinion was rendered a *nullity* by the Seventh Circuit's dismissal of the declaratory judgment action. Therefore, it could not be admissible as a judicial finding on any issue of the case. Further, under applicable rules of evidence, the opinion itself was inadmissible to prove any fact in the case. *Donellan, et al*, v. *Hardy*, 57 Ind. 393, (1877).

Finally, even if Judge Eschbach's *personal opinion* on the reasonableness of Motorists' denial of coverage might have had probative evidence or the bad faith issue, it was not presented in a form admissible at the trial. The document constituting Motorists' Exhibit "N" in a request for admissions is analogous to a physician's report or an engineer's study. It is *hearsay!* If Motorists wanted to avail itself of the judge's opinion as an expert on the bad faith issue, petitioner should have called him to the witness stand, attempted to qualify him as an expert, solicited his opinion by proper hypotheticals, and afforded Simpson an opportunity for cross-examination. Contrary to Motorists' assertions, it would have been violative of Simpson's fundamental rights to a trial conducted fairly in accordance with time-honored rules of evidence to permit Judge Eschbach's written opinion into evidence.

Although Simpson always has contended that the declaratory judgment action was a ruse, more indicative of bad faith than a sincere effort to resolve the cov-

erage issues, the trial court allowed Motorists to prove everything pertaining to that action except the erroneous, invalid opinion which resulted. Accordingly, Motorists was able to introduce before the jury the substance of its declaratory judgment complaint; Motorists showed the jury that it had commenced the declaratory judgment action on July 22, 1966, and that it asked that it be advanced on the calendar for a speedy hearing. The entire correspondence between Motorists and its attorneys with respect to filing a declaratory judgment action was allowed in evidence. (This correspondence was put into evidence by Simpson. Motorists objected frivolously on the basis of attorney-client privilege, objections properly brushed aside by the trial judge and the Court of Appeals.) Therefore, the jury had the entire picture of Motorists' faulty efforts to resolve the coverage issue.

Motorists never has been able to cite a single authority where the written opinion of a trial judge, reversed because that judge lacked jurisdiction over the case, has been accepted by any court as competent evidence of anything. The Seventh Circuit was correct in affirming exclusion of the evidence. Motorists does not come close to showing that exclusion of Judge Eschbach's opinion violates "minimum standards" governing the accepted and usual course of judicial proceedings of Federal appellate courts.

NO VIOLATION OF MINIMUM FEDERAL STANDARDS IN TRIAL COURT'S "BAD FAITH" INSTRUCTIONS

The trial judge found that Ohio courts recognized the bad faith standard in defining an insurer's duty toward its insured, rather than the negligence standards followed in Indiana. The instructions on bad faith given by Judge Noland are accurately set forth in Motorists' Petition at page 9. These instructions con-

form with the concept of the bad faith principle utilized by courts and legal writers everywhere, and certainly convey clearly and fairly the Ohio approach to an insurance company's duty in dealing with its insured's interests. Keeton, *Liability Insurance and Responsibility for Settlement,* 67 Har. Law Rev. 1136 (1954). It must be stressed that Motorists *never objected to these instructions on the grounds that they failed to incorporate the principal elements of bad faith* or somehow misstated Ohio law. Motorists' only objection was that the instructions presume the non-existence of a coverage question, which is a meaningless objection. Tr. II, p. 55. Therefore, Motorists waived the objection now asserted in its Petition. The Court of Appeals generously avoided upholding Judge Noland's instructions on the basis of Motorists' counsel's embarrassing failure to make any meaningful objection to the instructions, since the instructions were correct anyway. The U. S. Supreme Court does not consider alleged errors in instructions not raised in the trial court. *First Unitarian Society* v. *Faulkner* (1875), 91 U.S. 415, 23 L.Ed. 283; *Jacobs* v. *Southern Ry Co.,* (1916) 36 S. Ct. 588, 241, U.S. 229, 60 L.Ed. 970.

Motorists employs a revolting misrepresentation of the record in an effort to mislead the U. S. Supreme Court into believing that the trial court erroneously denied Motorists an instruction based on decisions of Ohio courts. On page 8 of its Petition, Motorists quotes from *Wasserman* v. *Buckeye Union Casualty Co.,* 32 O. St. 2d 69, 290 N.E.2d 836 (1972) and Motorists states:

> "*That instruction, which Motorists had requested in this action, is as follows:* 290 N.E.2d at 840:
>
> '2. A lack of good faith is the equivalent of bad faith and bad faith, although not susceptible of

> concrete definition, embraces more than bad judgment or negligence. It imports dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.' "

Motorists never submitted an instruction remotely like the *quotation* from *Wasserman* which Motorists sets up in its brief in such form as to lead the reader to think Motorists submitted an instruction which read that way. Motorists should be rebuked for this cruel attempt at deception at page 8 of its Petition.

Motorists' tendered instruction [3] contains self-serving declarations lifted from its own policy, and erroneous statements of law. The last paragraph is patently

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[3] Motorists' Instruction No. 7 (its only tendered instruction purporting to define "bad faith") reads:

"Instruction No. 7

"As to Count II, Motorists Mutual's insurance policy provided that 'the company may make such an investigation on and settlement of any claim or suit as it deems expedient.'

"I instruct you that as a matter of law applicable to this case, Motorists Mutual can be liable if at all only for bad faith but not for negligence, as to plaintiffs' claim that it should have settled the death claim by Teresa Simpson as Administratrix against Penman, even though you first find that Penman also was insured by such policy.

" 'Bad faith' is not simply bad judgment and it is not merely negligence. 'Bad faith' imports a dishonest purpose, a conscious doing of wrong, arbitrary or capricious conduct, equivalent to fraud.

"Defendant was not required to decide at its peril whether Penman was or was not insured by its policy, nor was defendant required to make that decision on the basis of what was reasonable to believe. To recover on Count II, plaintiff must prove by the greater weight of all the evidence that defendant's *disclaimer* of insurance coverage to Penman was done in bad faith." (Our italics)

erroneous in that it requires plaintiff to prove that defendant's *disclaimer of coverage* was done in bad faith in order to recover. No authority supports such a burden. The plaintiff, under Ohio law, need only prove that the insurer exercised bad faith in its conduct toward its insured, "either in negotiations respecting a settlement of the claim against the insured or in the conduct of the trial of the tort action on behalf of the insured." (quote from Wasserman and Slater, 290 N.E.2d 837, 840; 187 N.E.2d 45, 46.)

We, therefore, have a situation where Motorists' claims that "minimum standards governing accepted and usual course of judicial proceedings of federal appellate courts" have been violated must be rejected because: (1) Motorists' tendered instruction on bad faith was so erroneous that it had to be refused, and (2) the trial judge gave its own proper instruction on bad faith without any valid objection from Motorists.

EVIDENTIARY FINDING RE PENMAN'S CONDITION WHEN STATEMENT OBTAINED NOT BASIS FOR CERTIORARI

Motorists' final complaint is that the Seventh Circuit violated minimum standards of Federal appellate procedure by including in its opinion a description of one of the circumstances under which Motorists obtained a statement from Penman. The Circuit Court of Appeals is bound by the evidence and inferences therefrom that favor and support the judgment of the jury and trial court. With respect to Penman's condition when Motorists' adjuster obtained a "statement" with Penman's signature on it, the record supports the inference that Penman was sedated when the adjuster purportedly interviewed Penman. It is clear from Motorists' "Review for Trial" (prepared by Mr. Williams who attended this trial) that Motorists was in doubt as to the

legal validity of Penman's statement because no clearance could be obtained from hospital authorities that Penman was free from the influence of drugs or sedatives. The statement is dated October 6, 1965, only four days after the accident in which Penman received serious injury and Raymond Simpson was killed. The jury could properly have concluded that Penman was sedated when the statement was purportedly taken. He was certainly badly injured, hospitalized, and emotionally distraught because of the tragedy he had caused and beyond doubt was no match for the skillful claims adjuster whose mission to the hospital was to procure Penman's signature on a document that would provide a foundation for Motorists' avoidance of its responsibility for damages. Mr. Williams was present throughout the trial as Motorists' personal representative but Motorists did not see fit to place Mr. Williams on the stand and make any explanation of his statement about Penman's sedation, and, therefore, Motorists was bound to face the obvious inferences to be drawn from Williams' statement.

The Court of Appeals did not detail the other facts surrounding Motorists' conduct in procuring this statement, facts which demonstrate bad faith conclusively regardless of Penman's condition. Griffin filed a Proof of Claim form October 4, 1965, with a Mr. Tillinghast of Motorists Mutual at Cincinnati, establishing Penman's residence as 860 Glenwood, Griffin's home. (Tr. I, pp. 54-59). That same day, Mr. Tillinghast wrote his Indiana adjuster, one Merle Robinson, instructing him to see Penman in the hospital in Lafayette and get a statement from him that would produce their "policy defense". (Tr. I, p. 58) Motorists' decision already had been made to retain control over Penman by virtue of

the cooperation clause in its policy, yet leave Penman to his fate when the inevitable heavy damages were assessed. Mr. Robinson wrote out the statement and procured Penman's signature. Mr. Robinson's purposeful insertion of the sentence "My permanent address is 817 Mann Place where my mother, Albia Penman, lives", contrasts markedly with the Proof of Claim filed two days after the accident by Griffin and with Penman's own sworn testimony that he had no other residence than Griffin's at the time of the accident. (Tr. I, p. 21) Robinson's sly insertion of "I asked Sylvester if I could use his 1960 Oldsmobile to take a girl out . . ." contrasts with the sworn testimony of both Penman and Griffin that nothing was said about Penman's reason for asking for the car or his intentions for using it. (Tr. I, pp. 24, 27, 28, 30, 36, 41)

Regardless of Penman's condition at the time his statement was taken, the record is beyond dispute that Motorists and its attorneys controlled Penman throughout the litigation under the guise of defending him and thereby developed its evidence for denial of coverage as best it could through statements and depositions of Penman. There is authority that an insurer is estopped from denying coverage when it defends an insured and at the same time gathers evidence for denial of coverage. *Employers Casualty Company* v. *Tilley,* (Tex., 1973) 496 S.W.2d 552; *Pacific Indemnity Company* v. *Acel Delivery Service, Inc.,* (5th Cir., 1973) 485 F.2d 1169. (As respondent, Simpson may support the judgment below on grounds not even considered by the court below. *McGoldrick* v. *Compagnie General Transatlantique,* (1940) 60 S.Ct. 670, 309 U.S. 430, 84 L.Ed. 849.

Penman's condition at the time his statement was taken was a minor evidentiary fact in the case, hardly

a fact that the Seventh Circuit placed "heavy reliance" upon. Motorists obviously hopes to divert this court's attention from the major evidence of bad faith adduced at trial and recognized by the Court of Appeals. The fact as to Penman's condition when his statement was taken is merely a small detail in the overall pattern of bad faith, which included:

(1) Motorists knew and admitted from the very beginning that the wrongful death claim against Penman was a clear case of liability worth substantially in excess of the $10,000.00 coverage (Tr. I, pp. 59-61, 74, 78 and 90) (Only skillful defense work limited the damages to $210,000.00), yet Motorists summarily rejected Simpson's offer to settle for the policy limit of only $10,000.00 (Tr. I, pp. 45-47);

(2) Penman never was advised of his personal exposure, that Simpson would surely obtain a large judgment against him in excess of Griffin's policy limits, although Motorists investigated the claim on Penman's behalf, controlled all settlement negotiations, defended Penman and retained complete control over the litigation.

(3) Motorists, while appearing for Penman and controlling his defense, summarily rejected Simpson's settlement offer on the very day it was received without first communicating it to Penman, advising him of it, or consulting with him about his rights in any way. (Tr. I, pp. 45-47);

(4) Motorists completely avoided disclosure to Penman that such a small sum as $10,000.00 would settle the case and never advised Penman that Simpson would release him from liability for only $10,000.00. (Tr. I, pp. 23-24) Such withholding of critical infor-

mation, in and of itself, is enough to subject Motorists to excess liability. The case of *Slater* v. *Motorists Mutual Insurance Company,* 174 O. St. 148, 187 N.E.2d 45, (1962) is cited in the footnote at page 11 of Motorists' Petition, as authority to the contrary. In that case, the insurer was charged only with failure to make official disclosures of its insured's limits *to the tort claimant,* and indeed there was evidence that the tort claimant's attorneys had been advised of the policy limits. Additionally, the insurer *even offered* the policy limits. One's imagination cannot be stretched to bounds that would admit *Slater* as authority permitting Motorists to withhold policy limit information and settlement demands *from an insured,* one whose defense is undertaken and controlled by an insurer committed to elude any payment whatsoever.

(5) Motorists never advised Penman that he could seek to make his own terms with Simpson or that he could contribute to settlement. Instead, Motorists controlled *all* settlement negotiations.

(6) Motorists hid the "resident of the household" coverage from Penman. Reference to this coverage was studiously avoided in all correspondence with Penman even though Motorists knew Penman was covered as a "resident" from the day Griffin filed his Proof of Loss two days after the accident, listing Penman's address as his own. (Tr. I, pp. 54-59) The only explanation for denying him coverage that Motorists ever gave Penman was that he did not have permission to use Griffin's car. While concealing the "resident of the household" coverage from Penman, Motorists took statements from Penman, including depositions, clearly calculated to build evidence against this coverage. This conduct in and of itself was bad faith as a matter of law encom-

passing "dishonest purpose, moral obliquity, conscious wrongdoing, and breach of a known duty through an ulterior motive . . . It also embraces actual intent to mislead or deceive another."

These are ample facts to support the Court of Appeals' affirmance of Count II.

JUDGE BELL'S CONCURRING OPINION CORRECTLY RECOGNIZED THAT AS AN INSURED, PENMAN WAS DEPRIVED OF COVERAGE TO HIS DETRIMENT

Motorists incorporates several footnotes into its petition, matters not important enough to be included in the body of the petition. Simpson does not agree that the footnotes are accurate characterizations of the record, but it would take considerable pages to refute these misstatements of the record one by one. However, footnote 7 on page 13 demands reply. Judge Pell noted the obvious: Despite Motorists' disclaimer, Penman was in fact an insured under Griffin's policy. That fact has now been judicially established beyond question or recall and is admitted by Motorists. One of the benefits Griffin paid for was coverage for Penman and Penman was denied the benefits of coverage. Therefore, neither Penman nor Griffin "got what he paid for" (Motorists' words, not Judge Pell's). Since Griffin listed Penman as a resident of his household, in the statement he executed "a few days after the accident", Motorists was indeed in bad faith in contending that Penman was not an insured, since being a resident of Griffin's household clearly established Penman to be an insured.

REASONS FOR DENYING THE WRIT

Motorists' Petition should be denied because there is nothing in it to show how this case fits within the requirements of Supreme Court Rule 19. Motorists has

not contended that an important Federal question is presented, or that the Seventh Circuit's opinion conflicts or causes confusion with the decisions of this Court or any other Federal Court. Motorists' only complaint is about an instruction, an evidentiary ruling, and a statement in the Court of Appeals opinion which is not of any ultimate significance in the decision. Congress has placed normal and primary responsibility on the Court of Appeals to resolve such matters. By straining the language of Rule 19 pertaining to departure from the accepted and usual course of judicial proceedings, Motorists does not thereby elevate the matters complained of to the status of Rule 19 issues. The cases cited in the Petition are not in point. The only "bizarre coalescence of factors involved in this" case was Motorists' bad faith effort to deprive Raymond Simpson's children and widow of the $10,000.00 policy coverage when the potential liability was in excess of $200,000.00. The cases cited by Motorists do not support its petition for certiorari.

Saldana v. *United States*, 365 U.S. 646 (1961) involved a narcotics conviction set aside because of events that occurred during the course of the prosecution not detailed in the opinion except that various trial judges before whom the case was pending expressed determination to impose severe jail sentences on the accused. Even the Solicitor General suggested during oral argument before the Court that the defendant had been unfairly treated.

Gibson v. *Lockheed*, cited by Motorists, is a case where a Court of Appeals had *reversed* a tort judgment for the plaintiff. The Supreme Court was called upon to issue certiorari on the ground that the decision disclosed conflict and confusion among the circuits in the

application of Rule 51. The Supreme Court held that a critical examination of the 118 decisions supposedly in conflict disclosed that there was no such conflict and confusion. However, the Supreme Court saw that the Court of Appeals had caused an injustice to the tort victim by its *reversal* for refusal of the District Court to give 4 of Lockheed's instructions. The Supreme Court held there was no error in refusing the instructions because Lockheed had not made proper objections to the refusal and there was no prejudicial error anyway so the District Court judgment was reinstated in the interests of justice.

However, the case at bar comes under the "rule of two" pronounced in *Comstock* v. *Group of Institutional Investors* (1948), 335 U.S. 211, 68 S.Ct. 1454, 92 L.Ed. 1911:

> "The issue of fact, contested in a long hearing, are not before us for review. Petitioner assured us, in support of the petition for certiorari here, that 'there is no factual controversy before this Court' and 'we assume the findings of the District Court.' Our challenge is directed only to the import of these unchallenged facts."
>
> "Much of petitioner's argument seems to depart from these assumptions and to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. This we cannot do. *A seasoned and wise rule of this Court makes concurrent findings of two Courts below final here in the absence of very exceptional showing of error.*" (Citing 14 cases.) (Our italics.)

This rule was followed in *Rudolph* v. *U.S.* (1962) 370 U.S. 269, 8 L.Ed. 2d 484, 82 S.Ct. 1277 reh. den. 371 U.S. 854 9 L. Ed. 93, 83 S.Ct. 15, and to this date never has been abandoned in any decision.

LaBuy v. *Howes Leather Company*, 352 U.S. 249 (1957) was a case where a district judge referred several anti-trust cases for trial before a magistrate and this court upheld issuance of a writ of mandamus to compel the trial judge to hear the cases himself. Surely none of these cases even remotely compare with this case and Motorists makes no cogent argument to show how any of the three cases it cites support its position.

At page 14 of its Petition Motorists calls the exclusion of Judge Eschbach's opinion as the "most arbitrary action of the court below". But Motorists was allowed to prove everything it desired about its imperfect efforts to create a coverage issue, including its aborted filing of the declaratory judgment action almost a year after the tort occurrence.

Motorists employs a deceiving and improper tactic: Instead of setting out the official opinion of the Seventh Circuit in its appendix as required by Rule 23(1), Motorists sets forth the slip opinion and then constructs arguments based on what was said in the slip opinion but later changed in the official opinion. When a party must resort to the slip opinion to dredge up its proclaimed most important issue, that party invites summary overruling of its petition.

It is proper for a Court of Appeal to correct an opinion by withdrawing a sentence therefrom even after the matter is pending on certiorari. *Kinnear-Weed Corp.* v. *Humble Oil* (5th Cir., 1961) 296 F.2d 215.

Motorists cites *Stevens* v. *Northwestern Nat. Cas. Co. of Milwaukee*, 305 F.2d 513, 6th Cir., 1962, and *Martin* v. *Travelers Indemnity Co.*, 450 F.2d 542, 5th Cir., 1971, for the proposition that "an insurance company is not liable for bad faith in refusing a settlement offer and insisting upon litigating the issues of liability or cov-

erage, when its position on those issues is not groundless or disingenuous". (Petition, page 14.) Simpson need not debate that proposition here, since the jury, trial judge, and Circuit Court of Appeals found Motorists to be guilty of bad faith despite the disclaimer of coverage and Motorists nowhere in its Petition challenges the sufficiency of the evidence to sustain the finding of bad faith. Neither cited opinion supports Motorists' contention that Judge Eschbach's opinion was improperly excluded. Certainly, neither supports the contention that an insurance company can cause its insured to be the victim of a tort judgment by fabricating tricky policy defenses. The *Stevens* case involved a very questionable liability situation in the tort claim and policy defenses were not involved at all. The court in *Martin* specifically held that

> "We hasten to point out that an insurer is not absolved of all responsibility to a possible insured whom it has undertaken to defend merely because the company is denying coverage." (page 552)

The facts of the *Martin* case, including the $100,000.00 limits the insurer would have had to pay to settle, are so different from the case at bar that it can provide no authority for Motorists' position where only $10,000.00 would have ended the case.[4]

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[4] The mainstream law on bad faith is that a denial of coverage, no matter how factually supported, is not a defense for failure to settle on behalf of the possible insured when good faith would otherwise require it. *Communale* v. *Traders & General Insurance Company*, 50 Cal. 2d 654, 328 P.2d 198 (1958); *Western Casualty & Surety Company* v. *Herman*, 405 F.2d 121 (1968, 8th Cir.); *Landie* v. *Century Indemnity Company*, (Mo. 1955) 390 S.W.2d 558; *Foundation Reserve Insurance Company* v. *Kelly*, 388 F.2d 528 (10th Cir., 1968). These cases make it clear that even an honest belief that coverage defenses exist do not excuse an insurance company from its duty to pay its policy limits when good faith would otherwise require it.

Motorists misstates *Wasserman* v. *Buckeye Union Casualty Company,* 32 Ohio St. 2d 69, 290 N.E.2d 837 (1972) at page 16 of its Petition. The basis of decision in that case was that Ohio does not recognize the negligence principle of excess liability but adheres to the bad faith principle. It does not at any place *require,* as claimed by Motorists, at page 16 of its Petition, that an instruction on bad faith "must state the elements of dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud". Instead, *Wasserman* merely states that an instruction containing all of the elements in paragraph two of the syllabus in *Slater* is a complete and correct statement. But at page 840 of 290 N.E.2d, 23 it can be seen that the Ohio Supreme Court surely did not require that the whole paragraph from *Slater* need be given, for the Court said:

> "Insofar as the *Slater* case sets out the essential elements of 'bad faith' as something more than mere negligence or bad judgment and implying a dishonest purpose, the charge was a correct and complete statement of the law."

In fact, the Ohio court was saying that a recitation of every alternative facet of bad faith described in *Slater* need *not* be included to constitute a correct and complete charge. The issue of just how bad faith should be explained to a jury was not dealt with in *Wasserman.* One need only read Judge Noland's instructions to see that he told the jury that more than mere negligence or bad judgment was required and that failure to settle was not determinative and that there was no duty to settle each and every claim and that all Motorists

had to show was good faith to escape liability. Judge Noland gave a clear explanation of "bad faith" stating that an insurer must give *equal consideration* to the interests of its insured. This concept of "equal consideration" is a much more meaningful and workable explanation of "bad faith" than "moral obliquity", "fraud", etc., yet it fairly encompasses the concepts that *Wasserman* cites from older Ohio cases. Surely Motorists does not contend that the "equal consideration" concept is unfair or improper. One cannot conceive of an Ohio court granting an Ohio insurance company license to sacrifice the interests of its insureds for the sake of its own. Thus, courts applying the "bad faith" theory of excess liability commonly use the "equal consideration" concept since it is the most readily understood by a jury. This concept is treated in Keeton, *Liability Insurance and Responsibility for Settlement,* 67 Harv. Law. Rev. 1136 (1954) cited at page 5 of Motorists' Petition. Indeed, many of the so-called elements of bad faith cited by Motorists from Wasserman are themselves best defined in terms of the duty to give equal consideration.

Of course, Motorists never objected to Judge Noland's "bad faith" instructions on the ground that they misstated Ohio law or didn't adequately cover it so Motorists cannot now make such a complaint. Motorists own tendered instruction was hopelessly erroneous as we have shown. The Court of Appeals properly upheld the district court on this issue.

As this Court now knows, the matter of Penman's condition when his statement was first taken never has been a fact of importance in this case. Whatever his condition, Motorists tried to beat him out of coverage

under the guise of representing his interests. Motorists cannot elevate this subsidiary fact issue to the status of "ultimate fact" (Petition, page 17) by so labelling it. There were so many hard-core indicia of bad faith in this case that Penman's condition when his statement was obtained was only cumulative.

CONCLUSION

A Federal jury, trial judge, and unanimous Circuit Court of Appeals has decided that (1) Penman was an insured under Griffin's policy, and, therefore, entitled to the benefits of coverage, and (2) that Motorists acted in bad faith in dealing with Simpson's offer to accept the policy limit in settlement of the claim against Penman. The coverage issue is not challenged in Motorists' Petition. The bad faith issue is challenged on the basis that Motorists was not accorded minimal standards of Federal judicial proceedings. The three matters Motorists complains about were properly determined by the court below. They are matters intended to be resolved by the Court below, and not this Court. Motorists has tried everything possible to delay execution of this judgment. It is time this litigation came to an end and Motorists paid.

Finally, the Supreme Court takes judicial notice of the fact that interest rates of 12% to 15% are readily obtainable by Petitioner as against the 8% running on the judgment. It is small wonder then that such groundless Petitions for Certiorari are filed. The Supreme Court should attach a penalty of 10% to stop such practices. Rule 56(2) makes provision therefor. Otherwise the Court will be swamped with groundless petitions for certiorari to take advantage of the current high interest rates.

WHEREFORE, Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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September 16, 1974

SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-130

MOTORISTS MUTUAL INSURANCE COMPANY,
Petitioner,

v.

TERESA SIMPSON, ADMINISTRATRIX, *et al.*,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1. Introduction

In this case, the court below affirmed a judgment of a federal district court under circumstances that deprived Petitioner ("Motorists") of any meaningful adjudication of the issues in the litigation and fail to meet the threshold standard, as stated in this Court's Rule 19 (b), of general consistency with the "accepted and usual course of judicial proceedings." Specifically, the Petition addressed (1) the court's determination that the district's court's instruction on the critical issue of "bad faith" incorporated the particular elements that the court below admitted to be required under applicable law, despite the failure of the challenged instruction to include any of those particular elements; (2) the court's action,

in denying rehearing, of deleting a sentence in its original opinion that had explained—by misstating the record—its reason for affirming the exclusion of Motorists' primary evidence on the "bad faith" issue; and (3) the court's basing its affirmance in large part on a finding of fact that was not at issue in the district court and that is without any rational support in the record.

Respondent's Brief in Opposition consists in substantial part of unusually strident characterizations of Motorists' Petition and its conduct throughout this litigation, which require no comment. Respondent also relies upon erroneous characterizations of the record that do deserve brief comment, even though they do not relate, for the most part, to the specific issues raised in the Petition. They deserve comment only because they further illustrate that the court below decided this case not upon the record as it existed but upon the record as Respondent erroneously described it. Finally, Respondent contends that the petition must be denied because of the " 'Rule of Two' " (Brief at 1, 19) and because this Court's Rule 23 is asserted to require the attachment to the Petition of opinions below as published by the West Publishing Company rather than, as the Rule appears to state, the opinions "delivered upon the rendering of the judgment or decree sought to be reviewed . . . ." Rule 23(1)(i).[1]

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[1] Respondent also contends that it was "deceiving and improper" (Brief at 20) for Motorists to make arguments based upon the opinions filed by the court rather than restricting its arguments to the language of the opinion as ultimately published at 494 F.2d 850. We suggest that our Petition made completely clear that the published opinion, which we cited, differed from the slip opinion only in one respect—the deletion of one sentence from the slip opinion filed by the court (App. A to Petition), for the reasons stated in the court's order denying rehearing (App. C to Petition). Indeed, we devoted substantial space to discussing that single difference between the opinion filed by the court and the opinion as ultimately published. See Petition at 9-10, 15.

2. Inapplicability of the "Rule of Two"

Respondent's reliance upon what she calls the Rule of Two is misplaced. We have no quarrel with the statement that this Court is extremely reluctant to review findings of fact made by a trial court and affirmed on appeal, though, contrary to Respondent's statement that the Court *never* has done so (Brief at 19), in fact the Court on many occasions has deemed it necesary "to make an independent examination of the whole record" despite a previous appellate affirmance of trial court findings. *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963).[2] If this were a case in which the findings at issue had been made by a court or jury and then affirmed by the court below, we would argue that the absence of any support in the record for those findings brought the case within the recognized exception to this Court's general deference to the consistent findings of two courts. But this is not such a case. The only finding of fact that we presented as an issue for review was the finding of the court below that Motorists' "bad faith" was shown by its obtaining a statement from the driver of the insured automobile, Mr. Penman, when he was under sedation. In our Petition (pp. 11-13, 16-17), we showed in some detail not only that there is no support in the record for that finding but also that the issue of Penman's condition when the statement was taken was not even an issue at the trial. Indeed, that was the point of our argument—the "sedation" finding of the court below came not on a review of the evidence relevant to the issues presented by Respondent's complaint and the district

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[2] See also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-292 (1964); *Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Blackburn* v. *Alabama*, 361 U.S. 199, 205 n.5 (1960); *Washington* v. *United States*, 357 U.S. 348 (1958) (summarily reversing, for insufficiency of evidence, a judgment of the Seventh Circuit that affirmed a conviction on the basis that the evidence *was* sufficient).

court's instructions. Rather, that issue first appeared in the court below.

Respondent's Brief does not contend that Penman's condition at the time of his statement was an issue presented at the trial, nor does it in any way question our rather detailed analysis of the record (Petition at 11-12) showing the complete absence of any basis for a conclusion that the Penman statement was taken while he was under sedation.[3] In fact, Respondent characterizes that matter as "a minor evidentiary fact in the case" and a "small detail" (Brief at 14-15) that "never has been a fact of importance in this case." (Brief at 23) Unquestionably that is true as to the trial. Respondent also argues that it is true as to the appeal, however, and that simply is not so. We need not argue the point further, since one need only look at the court's opinion (App. A to Petition) in discussing the "evidence" of bad faith to determine the critical nature of that finding.

3. Respondent's Description of the Record

One further point should be made as to Respondent's discussion of the Penman statement. Respondent refers to the conduct of the insurance adjuster who interviewed Mr. Penman and took the statement as follows:

> "[his] sly insertion of 'I asked Sylvester if I could use his 1960 Oldsmobile to take a girl out . . .' contrasts with the sworn testimony of both Penman and Griffin that nothing was said about Penman's reason for asking for the car or his intentions for using it. (Tr. I, pp. 24, 27, 28, 30, 36, 41)." Brief, at 14.

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[3] Respondent does speculate that the jury might properly have concluded that Penman was sedated, merely because Penman "was certainly badly injured, hospitalized, and emotionally distraught because of the tragedy . . . ." (Brief at 13). Respondent does not support that speculation by any references to the record, because there are none, except with respect to Penman's brief hospitalization (see Petition at 12).

The court below also found in its opinion that "Penman did not state the purpose for which he intended to use the car, nor did Griffin place any limitation on its use" (App. A to Petition, at 4a), quoting almost verbatim from Respondent's brief in that court. We did not raise that finding as an issue in the Petition, even though it was critical on the issue of the scope of permission and thus policy coverage. Since Respondent seeks to make an issue of it, however, we note it now as an example of the adjudicative procedure of the court below, which was to decide the case in accordance with Respondent's highly inaccurate description of the record.

One may look in vain at the first five transcript pages cited by Respondent for any reference to Penman's language in asking Mr. Griffin for the use of his automobile. At the last reference, transcript page 41, the record is precisely the opposite of what Respondent suggests and what the court below found:

> "Q [by Respondent] What did he say to you and what did you say to him at that time?
> "A [by Mr. Griffin] Well he asked me to take a friend home and I gave him permission to take her home."

One reason that Penman's hospital statement was not an issue at the trial was that its contents, especially including the point raised by Respondent, were corroborated by Griffin's unsworn statement to Motorists taken two days earlier (Tr. at 97-8) and also by the later sworn testimony of both Penman and Griffin on numerous occasions.[4] Indeed, the district court in this case, in dis-

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[4] Griffin's written statement to Motorists (Tr. 97-100) was made on October 4, 1965, when he filed a proof of claim. Respondent insists that Griffin's claim listed Penman as a "resident of his household" (Brief at 16-17), so that Motorists knew from the first that Penman was covered. That simply is not so. Griffin's statement said that, about six days before the accident, Penman "came

cussing instructions, stated, "Well, I thought the testimony was all centered towards the fact that he [Penman] said to Mr. Griffin, 'May I use your car to take Ann Barrier [sic] home?'" (Tr. II, at 17). And the district court (N.D. Ind.) in its opinion in the prior Declaratory Judgment Case found that "Penman asked Griffin whether he could borrow Griffin's car 'to take Ann Berry home.'" (App. D to Petition, at 22a). The sworn testimony read to the jury in this case included Penman's following answer to a question by Respondent as to the circumstances under which he obtained the automobile:

> "A Well I asked Mr. Sylvester could I use his car to take Ann home.
> "Q Ann, meaning whom?
> "A Ann Berry." (Tr. at 124)

That sworn testimony also included another answer by Penman, on another occasion, to the same question by Respondent:

> "A I told him some girl there, she wanted to go home, so I asked could I use his car. He told me 'yes,' so I left.
> "Q What was the girl's name? Do you remember?
> "A Ann." (Tr. at 111).

Further, that sworn testimony included repeated testimony by Mr. Griffin that Penman had asked him to use the car for the specific purpose of taking Ann Berry to her nearby home (Tr. at 41, 98, 117, 132, 133) and that Griffin had told a policeman on the day after Penman's accident that "I told him [the Officer] that I let him [Penman] have my car to go take a girl home. I did not give him permission to take my car out of town." (Tr.

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to stay with us temporarily. He was just discharged after having spent ten years in the United States Navy. He is married, his wife is in California. He was planning to reenlist in the Navy." (Tr. 97-8). See also Petition at Appendix E.

at 107). Should there be any question remaining about the exact nature of the Penman request, as shown by the record here, Mr. Griffin's sworn testimony included the following:

> "Q Now, Mr. Griffin, would you tell the Court exactly what conversation occurred in connection with your lending your car to Mr. Penman? I am referring to the evening of October 1, 1965, before this accident. Would you tell the Court what Mr. Penman, if anything, said to you and what, if anything, you responded to him?
>
> "A Mr. Penman asked me could he take Ann home. Excuse me, he asked me could he use my car to take Ann home and I told him 'yes.'" (Tr. at 117).

The short of the matter is that, with respect to the above quotations from the opinion of the court below and from Respondent's Brief in this Court, see p. 5, *supra*, there are two very different cases here. One case comprises the facts presented by the record in the district court and the other case comprises the "facts" stated, with consistency, by Respondent and by the opinion of the court below. The burden of our position simply is that an appellate court is bound to decide only the case presented by the record.[5]

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[5] As to other "factual" assertions by Respondent (Brief at 15-16), Motorists' letters to Penman advised him of the exact terms of Respondent's settlement offer on the day that Motorists received that offer, advised him that Respondent claimed $400,000 in damages from him, advised him that Motorists would not pay any judgment against him, and advised him that, because of his heavy personal exposure, he was entitled to retain his own attorney to defend him (Tr. 43-51). Penman neither sought any information from Motorists nor responded to any letters from Motorists (Tr. 204).

4. The Instruction on Bad Faith

In responding to our arguments concerning the instruction on the central issue of "bad faith" (Petition at 8-9, 15-16), Respondent contends that Motorists is guilty of a "revolting misrepresentation" in that it did not ask for an instruction incorporating the specific elements of bad faith stated repeatedly by the Ohio Supreme Court and, moreover, that Motorists did not object to the instruction given by the district court on the ground that it failed to incorporate those elements. (Brief at 9-11, 22). As to the first point, Respondent quotes the instruction requested by Motorists (Brief at 11, n.3) and the elements required by the Ohio Supreme Court to be included in an instruction as to the meaning of "bad faith," and it is necessary only to compare the language to see the virtual identity of the two. As to the second point, we note that the court below did not suggest that Motorists failed adequately to object to the instruction, perhaps because the record shows that Motorists *did* object to the instruction on the ground that it did not make clear the meaning of "bad faith" as defined "under the law of Ohio" and as accurately defined in "Defendant's instruction number seven." (Tr. II at 54). In stating that Motorists objected only on the ground that the instruction presumed the non-existence of a coverage question, Respondent cites the following page—55—of the instruction transcript (see Brief at 10), which does indeed contain that objection. That objection begins at the bottom of page 54, however, with the words, "*Further*, the instruction in . . . ." (Emphasis added.)

5. Exclusion of The Declaratory Judgment

Concerning the action of the court below in excluding evidence of the judgment in the Declaratory Judgment action and of Respondent's admissions regarding that judgment, Respondent's arguments are as follows: (a) it

was "improper" for Motorists' to point out that the court, in entering its judgment, filed an opinion (App. A to Petition) that affirmed the exclusion on a ground that it later deleted from the opinion in denying rehearing (App. C to Petition), since Petitioner is permitted only to discuss the "official" opinion as published by the West Publishing Company (Brief at 20); (b) the 1877 case of *Donellan* v. *Hardy*, 57 Ind. 393, holds that a judicial opinion itself is inadmissible as evidence to prove a fact; and (c) the only acceptable method of proving the fact of a judgment or a judicial opinion is by calling the Judge as an expert witness (Brief at 8). *Donellan* v. *Hardy* in fact held that, in order to prove the fact of a judgment of the Indiana Supreme Court in a related case by competent evidence, a party must offer the best evidence—a certified copy of the opinion and judgment from the court records—rather than secondary evidence —the opinion as printed in the Indiana Reports, and therefore the printed opinion was inadmissible. 57 Ind., at 402-3. In short, the *Donellan* case lends support for the *admissibility* of the judgment as offered by Petitioner and also is inconsistent with Respondent's novel theory that a judicial opinion or judgment does not become "final" and "official" unless and until it is printed in a book. See also *Public Service Company of Indiana* v. *Hamil*, 416 F.2d 648, 653 (7th Cir. 1969) (dissenting opinion of a state court was "evidence" that agency action found unlawful by majority was not "arbitrary").

It should be noted that the court below did not base its affirmance on the arguments made here by Respondent, which it also made there. Had the court accepted those arguments, we would now be in a position to say only that the court rather clearly erred on the law of evidence, which would not justify this Court's exercise of its supervisory power. Our point in the Petition (Petition at 9-11, 14-15) was that the court's treatment of that issue was

not only wrong but also arbitrary, and it is that arbitrary treatment of Motorists that justifies this Court's grant of certiorari and summary reversal of the judgment below.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted and the judgment of the court below should be summarily reversed.

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